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HARVARD

131

REPORTS OF CASES

June 14

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ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION

SEPTEMBER TERM, 1911.

MIDDLE DIVISION

DECEMBER TERM, 1911.

CHARLES T. CATES, JR.

ATTORNEY-GENERAL AND REPORTER.

VOL. XVII.

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NOV 1 8 1912

JUDGES OF THE SUPREME COURT OF TENNESSEE.

STATE AT LARGE.
GRAFTON GREEN.
*A. S. BUCHANAN.

WESTERN DIVISION.
M. M. NEIL.

MIDDLE DIVISION.
D. L. LANSDEN.

EASTERN DIVISION.
JOHN K. SHIELDS, CH. J.

ATTORNEY-GENERAL AND REPORTER
CHARLES T. CATES, JR.,
Knoxville, Tenn.

COURT OF CIVIL APPEALS OF TENNESSEE.

EASTERN DIVISION.
§ H. N. CATE.
H. Y. HUGHES.

MIDDLE DIVISION.
S. F. WILSON.
JOS. C. HIGGINS.

WESTERN DIVISION.
FRANK P. HALL.

*Mr. Justice W. D. Beard died December 7, 1910, and Mr. A. S. Buchanan was, by the governor, appointed as his successor, and was elected by the people, at the August election, 1912, to fill out the unexpired term.

§Judge H. N. Cate was, by the governor, appointed to succeed Judge John M. Taylor, who died on the 17th day of February, 1911; and at the August election, 1912, Felix W. Moore, of the Western Division, was elected by the people to fill out the unexpired term.

CLERKS OF THE SUPREME COURT OF TENNESSEE.

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JOE J. ROACH	NASHVILLE
T. B. CARROLL	JACKSON

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§ V. C. ALLEN	12th Division	Dayton

*Holds Circuit Court of Fentress County.

§This division was created by Acts 1911 (Private), ch. 435, and Judge V. C. Allen, appointed by the governor to fill the office, was elected by the people at the August election, 1912, to fill out the unexpired term.

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S. D. McKEYNOLDS, for 6th Circuit	Chattanooga
C. W. TYLER, for Montgomery County	Clarksville

*Holds Chancery Court of Williamson County.

§Judge M. M. Allison resigned, and, on the 22d of December, 1911, Chas. R. Evans was, by the governor, appointed to fill the vacancy, and, at the August election, 1912, Nathan L. Bachman was elected by the people to fill out the unexpired term.

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JNO. L. NEELEY, for Williamson County,	Franklin	

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W. R. HARRISON, for Shelby County	Memphis
HARRY T. HOLMAN, for Shelby County	Memphis
XEN HICKS	2d Circuit Clinton
J. R. MITCHELL	5th Circuit Crossville
LAWSON M. MYERS	7th Circuit Pikeville

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1911.

ROY PARROTT v. STATE.

(Knoxville. September Term, 1911.)

- 1. EVIDENCE.** Of failure of accused to testify and deny testimony incriminating him is incompetent, and not admissible against him in a subsequent trial.

The rule that statements made in the presence of the accused, charging him with crime, create a presumption against him, if not denied by him, does not apply to such statements made in the course of judicial proceedings, whether he himself be on trial, or the case be one in which he is not directly concerned; for, if he himself be on trial, the constitution (art. 1, sec. 9) protects him against compulsion "to give evidence against himself," and to admit such evidence would practically nullify the constitutional provision; and, if the trial be one in which he is not directly concerned, he has no right to inter-

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fere or intrude therein, and is not called upon to speak, and his failure to speak cannot, in subsequent direct proceedings against him, afford any presumption of acquiescence.

Constitution referred to and construed: Art. 1, sec. 9.

Cases cited and approved: Bell v. State, 93 Ga., 557; State v. Mullins, 101 Mo., 514, 517; State v. Hale, 156 Mo., 102, 107, 108; Comstock v. State, 14 Neb., 205; People v. Willett, 92 N. Y., 29; Maloney v. State, 91 Ark., 485, 491, 121 S. W., 428; Commonwealth v. Zorambo, 205 Pa., 109; Broyles v. State, 47 Ind., 251; State v. Senn, 32 S. C., 392; State v. Boyle, 17 R. I., 537.

2. **SAME.** Same. Compulsion of accused to testify, on cross-examination, as to incriminating testimony in committing trials not there denied by him, and charge of court thereon, constituting reversible error.

In his trial under indictment, evidence was drawn from the accused, on his cross-examination, and over his objection, that in committing trials against him before a justice of the peace and before a United States commissioner, certain witnesses testified in his presence and hearing that he had sold them whisky, and that in said trials he (the accused) failed to testify and deny the statements of such witnesses; and the charge of the trial judge upon such evidence was to the effect that the failure of the accused to testify and deny such testimony would be a circumstance to which the jury could look, and give such credit as they thought it entitled to, as throwing light on the guilt or innocence of the accused, but not for any other purpose; and it is *held* that both the admission of such evidence and the charge of the court thereon constitute reversible error.

FROM McMINN.

Appeal from the Circuit Court of McMinn County.—
S. C. BROWN, Judge.

Parrott v. State.

EUGENE E. IVINS and E. L. ROBERTS, for Parrott.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

—

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error being on trial in the circuit court of McMinn county under a charge of selling intoxicating liquors within four miles of an institution of learning in violation of the statute against such acts, evidence was introduced, over his objection, as follows: On cross-examination he was asked if Joe Taylor did not testify before a United States commissioner in his presence and hearing that he had sold whisky to said Taylor, and further if he did not fail to go on the witness stand and deny it; also, the same question as to Ham Hacker; also, whether Ham Hacker had not testified before a justice of the peace on a committing trial the same thing in his presence, with a like failure on his part to go on the witness stand and deny it—to all of which questions he answered, "Yes." On this evidence the trial judge charged the jury as follows:

"Gentlemen of the jury: I instruct you that it is competent in any case to prove that a statement has been made in the presence of the defendant, by which the defendant is accused of wrongdoing, and that the defendant admitted the truth of the statement or remained silent failing to deny it. And in this case if you should be satisfied from the evidence that witnesses at other trials had testified that the defendant did that which he now denies, and that he was present, and failed to then deny

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the charge, this would be a circumstance which you could look to, giving to it such credit as you think it is entitled to as throwing light on the defendant's guilt or innocence in the present case, but you cannot look to it for any purpose than those hereinbefore indicated."

The evidence was incompetent, and the charge was erroneous. The rule that statements made in the presence of an accused person charging him with crime create a presumption against him, if not denied by him, does not apply to such statements made in the course of judicial proceedings. *Bell v. State*, 93 Ga., 557, 19 S. E., 244; *State v. Mullins*, 101 Mo., 514, 517, 14 S. W., 625; *State v. Hale*, 156 Mo., 102, 107, 108, 56 S. W., 881; *Comstock v. State*, 14 Neb., 205, 15 N. W., 355; *People v. Willett*, 92 N. Y., 29; *Maloney v. State*, 91 Ark., 485, 491, 121 S. W., 728, 134 Am. St. Rep., 83; *Com. v. Zorambo*, 205 Pa., 109, 54 Atl., 716; *Broyles v. State*, 47 Ind., 251; *State v. Senn*, 32 S. C., 392, 11 S. E., 292; *State v. Boyle*, 13 R. I., 537. If the party in question be on trial, he cannot thus be forced to give evidence against himself in violation of the constitutional guaranty which protects him against incriminating himself contrary to his will. If the trial in progress be one in which he is not directly concerned, as for example a coroner's inquest, one of the cases above cited, he has no right to interfere or intrude therein, and is not called upon to speak, and his failure to speak cannot in subsequent direct proceedings against him afford any presumption of acquiescence. If in any former trial he was justified in refraining from speaking by the constitu-

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tional provision above referred to, he rightly refrained, and his conduct should not be used against him in any subsequent trial. To grant its use would practically nullify the constitutional provision. Therefore in no event is such evidence competent against him.

For the error indicated, the judgment of conviction will be reversed, and the cause remanded for a new trial.

Bank v. Wood.

HOLSTON NATIONAL BANK v. A. H. WOOD.

(*Knoxville*. September Term, 1911.)

1. **COLLATERAL SECURITIES.** Pledgee is not guilty of conversion by his unauthorized purchase at their sale, so long as he retains possession with power to return them to pledgeor, upon proper tender and request.

The pledgee of bonds and stocks as collateral security for the payment of indebtedness due him is not guilty of a conversion thereof by his unauthorized purchase of the same at a sale made after default, so long as he retains possession and control, with power to return the collateral to the pledgeor, upon payment of the indebtedness so secured, and has not refused to return the same upon a proper tender of the indebtedness, and request for the return of the collateral. (*Post*, pp. 12-14.)

Cases cited and approved: *Ball v. Stanley*, 5 Yerg., 199; *Upchurch v. Darnell*, 3 Sneed, 444; *Scruggs v. Lester*, 1 Heisk., 150; *Bank v. Smith*, 110 Tenn., 337; *Terry v. Bank*, 93 Ala., 599; *Winchester v. Joslyn*, 31 Colo., 220; *Bryan v. Baldwin*, 52 N. Y., 232; *Bank v. Rush*, 85 Fed., 539; *Glidden v. Bank*, 53 Ohio St., 588.

2. **SAME.** Same. Pledgee's purchase without express authority may be treated by pledgeor as valid or null; but not as a conversion, when.

In the absence of express authority, the rule is that a pledgee, upon sale after default, cannot become the purchaser of the property pledged to secure him; and where the pledgee, without authority, becomes the purchaser of securities hypothecated with him, the pledgeor can either treat the sale as valid and hold the pledgee liable for the amount bid by him, or the pledgeor can treat the sale as a nullity; but he cannot treat such sale as a conversion, and hold the pledgee liable for some alleged valuation of the collateral, so long as the pledgee retains the

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possession thereof and does not refuse to return it after proper tender of the amount of his debt. (*Post*, p. 14.)

See citations under the preceding headnote.

3. **SAME.** Power of sale and right to purchase agreed to be extended to subsequent collateral does not so extend to subsequent collateral under written agreement containing no such power and right.

Where collateral security is pledged for the payment of a promissory note, by a printed agreement contained in or annexed to the note, with power of sale after default, and right to purchase the same at such sale, vested in the holder of the note, with a further printed provision that "in case of any exchange or addition to said collateral, we agree that the above agreements and provisions shall extend to such new or additional collateral," this provision was intended to apply to collateral deposited by the maker of the note, unaccompanied by any other written agreement, and does not apply to collaterals subsequently pledged under a definite written agreement, containing no such power of sale and no such right to purchase. (*Post*, pp. 10, 14-16.)

- 4 **SAME.** Same. Contract authorizing property pledged for particular debt to be held for general indebtedness is valid, but will be construed in favor of pledgeor, especially if on a printed form furnished by pledgee.

The provision in a note authorizing the payee bank to hold, as security for general indebtedness, property pledged for a particular debt, is valid, but the rule is that such agreement will not be construed so as to extend the obligation beyond that intended by the pledgeor; and, if such agreement is on a printed form furnished by the bank and signed by its customer, and any doubt arises as to its proper interpretation, it will be construed in favor of the customer. (*Post*, p. 16.)

Cases cited and approved: *Bank v. Brown* (Tenn. Chy. App.), 53 S. W., 206; *Harris v. Bank*, 77 Md., 423; *Hathaway v. Bank*, 131 Mass., 14; *Gillet v. Bank*, 160 N. Y., 549.

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5. **BILLS AND NOTES.** Stipulation for attorneys' fees is valid, and will be enforced to extent reasonable.

While a stipulation in a promissory note for attorneys' fees is valid, and will be enforced, still the court is not bound by a provision to the effect that any particular amount shall be allowed for such fees, and no matter what stipulations as to the amount is made, it will not be enforced unless it appears to the court to be reasonable. (*Post*, pp. 10, 16, 17.)

6. **ATTORNEYS' FEES.** Discretion in allowing attorneys' fees will not be revised except for injustice.

The supreme court is not disposed to interfere with the allowance of attorneys' fees in the lower court, unless it can see that some injustice has been done; for such matters are largely within the discretion of the court, and the supreme court will not interfere with the exercise of that discretion unless the allowance made is thought to be materially wrong. (*Post*, p. 17.)

- 7 **CHANCERY PLEADING AND PRACTICE.** Relief may be granted complainant under general prayer, upon facts appearing in bill and cross bill, to settle rights and end controversy.

Where the bill does not specifically pray for the relief granted by the chancellor to the complainant, but the decree is warranted by the facts appearing from the bill and the cross bill, and by the prayer for general relief, and such decree settling the rights of all the parties and ending the controversy, or putting an end to the litigation between the parties, will be affirmed by the supreme court. (*Post*, pp. 17, 18.)

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
WILL D. WRIGHT, Chancellor.

Bank v. Wood.

WEBB & BAKER, for complainant.

JOURLMON, WELCKER & SMITH, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

The facts of this case necessary to be stated are these:

A. H. Wood was bound to the Holston National Bank upon three notes as indorser or joint maker, and in 1907, addressed to the bank the following letter:

“Knoxville, Tenn.,
“Sept. 17, 1907.

“Holston National Bank,

“Knoxville, Tenn.

“Gentlemen:

“I herewith inclose you certificates, Nos. 10, 11, 12 and 19, of the Tennessee Iron Ore Company, aggregating 175 shares of its capital stock:

“Certificate No. 10 being for 50 shares;

“Certificate No. 11 being for 50 shares;

“Certificate No. 12 being for 48 shares;

“Certificate No. 19 being for 27 shares.

“Also one certificate No. B-11 for 250 shares of the Big Brushy Coal & Coke Company, of the par value of \$100 each.

“I send you these certificates to be held by you as additional collateral security for three notes for which I am responsible as indorser, which you now hold, to wit:

“Two notes of the Big Brushy Coal & Coke Company, one dated November the 27th, 1906, and the other dated August 30th, 1906, each for \$10,000, made by the Big Brushy Coal & Coke Company, and indorsed by me, A.

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H. Wood; and one note of the Harriman Knitting Mills Company for \$15,000, dated August 8th, 1907, and indorsed by me, A. H. Wood.

“The two notes of the Big Brushy Coal & Coke Company are past due, and it is understood by me in putting up this collateral for further protection to these notes, that the bank does not extend to me further time on these notes and does not agree to do so.

“As to the note of the Harriman Knitting Mills, the stock here inclosed is intended as collateral security for the present note, or any renewal thereof.

“Yours very truly,

“A. H. Wood.”

The note of the Harriman Knitting Mills, referred to above, was executed by the Knitting Mills and A. H. Wood jointly. It was upon one of the bank's printed collateral forms, authorizing the bank upon default to sell said collateral at public or private sale and to become the purchaser of said collateral at such a sale. The note also contained two provisions material in this suit, as follows:

1st. “In case of any exchange or addition to said collateral, we agree that the above agreements and provisions shall extend to such new or additional collateral.”

2nd. “If this note is placed in the hands of an attorney at law for collection, we agree to pay 10 per cent attorneys' fees, and all expenses incurred in its collection; and that if it is sued on, said attorneys' fees and expenses shall be taxed up in judgment.”

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This note of the Harriman Knitting Mills was renewed several times after the deposit with the bank of the additional collateral referred to in the agreement of Mr. Wood quoted above. The original note of the Harriman Knitting Mills mentioned in its face, as collateral deposited to secure its payment, only the \$15,000 of bonds of the Harriman Knitting Mills. The renewals of this note were drawn in the same way, and in none of them was any reference made to the stock of the Tennessee Iron Ore Company, or the stock of the Big Brushy Coal & Coke Company deposited with the agreement heretofore referred to.

After several renewals of this note, no payment having been made thereon, the bank advertised for sale all said stock and also the bonds of the Harriman Knitting Mills Company. It appears that this sale was enjoined by proceedings in the chancery court, but, upon appeal to this court, the injunction was modified so as to restrain only the sale of the stock of the Big Brushy Coal & Coke Company, and the bank was allowed to proceed with the sale of the Tennessee Iron Ore Company stock and of the bonds of the Harriman Knitting Mills Company.

Other advertisement was made and at public sale the bank became the purchaser of both stock and bonds, bidding in the bonds for \$4,000 and the Iron Ore Company stock for \$2,500. It credited the \$15,000 note with \$6,500. the amount of its bid less expense of advertising, and has brought this suit against Mr. Wood to recover the balance due on the \$15,000 note, together with 10 per

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cent attorneys fees. The attorneys' fees amount, it claims, to \$1,588.50, that being ten per cent of the face of the note, with some interest added.

An answer to this bill was filed by the defendant below and subsequently a cross bill. The substance of these pleadings by defendant was that the bank had no authority to sell and bid in the stock and bonds as it had done, or at least to bid in the stock, and it was charged that the bank was guilty of a conversion with reference to the stock, which it was claimed was worth about \$17,000. A decree was therefore sought against the bank by this cross bill for the value of the stock. It was also maintained by the defendant below that in any event the attorneys' fees claimed by the bank were unreasonable and should not be allowed.

Considerable proof was taken in the case, and, upon the hearing, the chancellor was of opinion that the bank was entitled to sell the bonds of the Harriman Knitting Company and to purchase same itself, but that it was not authorized to become the purchaser of the stock of the Tennessee Iron Ore Company. He was further of opinion that the bank was entitled to 10 per cent attorneys' fees only upon the balance due on the note, and not to 10 per cent attorneys' fees on the whole amount. Inasmuch as the bank was still in possession of the stock of the Tennessee Iron Ore Company and had a right to subject it to the payment of the balance due on the note, the chancellor directed that said stock be sold and the proceeds of the sale credited upon the note; and that after

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such credit was duly made the bank be given a decree against the defendant for the remainder due upon the note and for some \$1,300 attorneys' fees.

From this decree the bank has prayed and obtained an appeal to this court in so far as it held that it was not entitled to become the purchaser of the stock of the Tennessee Iron Ore Company at the sale; and from the chancellor's allowance as to attorneys' fees.

In disposing of this case, we may first observe that there was no conversion of this stock by the bank, regardless of whether it was entitled to become the purchaser of said stock at the sale or not.

The bank is still in the possession of the stock and it is still within the power of the bank to return this stock to Mr. Wood, the pledgeor, upon payment by him of the balance of the indebtedness for which it was pledged. It does not appear that any tender of this balance has ever been made, and there has been no refusal on the part of the bank to return the stock to Mr. Wood after a proper tender of the balance of the debt for which it is held. Under these circumstances, there is no reason, upon our cases, for holding the bank guilty of a conversion. See *Ball v. Stanley*, 5 Yerg., 199; *Upchurch v. Darnell*, 3 Sneed, 444; *Scruggs v. Lester*, 1 Heisk., 150; *Memphis City Bank v. Smith*, 110 Tenn., 337.

While, in the absence of express authority, the rule is that a pledgee, upon sale after default, cannot become the purchaser of property pledged to secure him, nevertheless, it is well settled that "the purchase by the

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pledgee, however, so long as he retains possession and control, does not amount to a conversion of the property and cannot be so treated by the pledgeor." 31 Cyc., 880; *Terry v. Birmingham National Bank*, 93 Ala., 599; *Winchester v. Joslyn*, 31 Colo., 220; *Bryan v. Baldwin*, 52 N. Y., 232; *Kansas City First National Bank v. Rush*, 85 Fed., 539. To the same effect, see *Glidden v. Mechanics Bank*, 53 Ohio St., 588, also reported in 43 L. R. A., 737, where all the cases are collected in a note—all being to the same effect.

Under the cases referred to here, where the pledgee without authority becomes the purchaser of securities hypothecated with him, the pledgeor can either treat the sale as valid and hold the pledgee liable for the amount bid by him at such sale, or the pledgeor can treat the sale as a nullity. The pledgeor, however, cannot treat such sale as a conversion and hold the pledgee liable for some alleged valuation upon the stock, so long as the pledgee retains possession of the stock and does not refuse to return it after proper tender of the amount of his debt.

The bank insists, however, that by reason of the provisions contained in the face of its collateral note, it was entitled to become the purchaser of this stock at the sale held by it. This provision has been heretofore referred to and is to the effect that, "in case of any exchange or addition to said collateral, we agree that the above agreements and provisions shall extend to such new or additional collateral."

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It is insisted that when Mr. Wood deposited the Tennessee Iron Ore stock as additional collateral for the security of this \$15,000 note, the bank became entitled, under the provisions of the note just quoted, to subject the stock to sale and to become the purchaser thereof, just as it was entitled to treat the collateral mentioned in the face of the note.

We cannot assent to this proposition, but think that the chancellor's decree was correct.

This provision in the note was intended to refer to collateral deposited by the maker of the note, unaccompanied by any other written agreement. It will be recalled that when Mr. Wood placed with the bank the stock of the Tennessee Iron Ore Company, he at the same time gave to the bank a letter or agreement, reciting the purposes for which, and the conditions upon which, it was pledged. It is to this agreement that we must look to determine the rights of the parties with respect to this stock, rather than to some other general contract existing between the parties, in which the stock was not mentioned.

It will be remembered that after the deposit with the bank of the stock of the Tennessee Iron Ore Company, the \$15,000 note was renewed several times, but in none of these renewals was this stock mentioned or referred to. If the bank had desired to bring this stock within the terms and provisions of the \$15,000 note, it should have made specific mention of the stock in one of these renewal notes. Especially, is this true when there was

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in existence a written contract of pledge with reference to this particular stock, the provisions of which controlled until they were superseded or vacated by some act or agreement of the parties.

While it has been held in Tennessee (*Hanover National Bank v. Brown*, Chy. App., 53 S. W., 206), that these provisions in a note authorizing a bank to hold, as security for a general indebtedness, property pledged for a particular debt, are valid, nevertheless an examination of the authorities shows the rule to be that such an agreement will not be construed so as to extend the obligation beyond that intended by the pledgeor; and, if such agreement is on a printed form furnished by the bank and signed by its customer, and any doubt arises as to its proper interpretation, it will be construed in favor of the customer. *Harris v. Frankfort Bank*, 77 Md., 433; *Hathaway v. Fall River National Bank*, 131 Mass., 14; *Gillet v. Bank of America*, 160 N. Y., 549.

It cannot be said that the general provisions in a printed bank note, with reference to property pledged at the bank and not mentioned in the note, can override, add to, or vary the terms of a definite written agreement particularly witnessing the pledge of this property.

Upon the question of the allowance of attorneys' fees, we think there is no error in the chancellor's decree. While a stipulation in a note for attorneys' fees is valid and will be enforced by this court, the court is not bound by a provision to the effect that any particular amount shall be allowed for such fees, and no matter what stipu-

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lation as to the amount is made in the face of the note, it will not be enforced unless it appears reasonable to the court.

It is not necessary to determine whether, under a strict construction of the provisions of this note, the complainant would be entitled, as attorneys' fees, to 10 per cent of the full amount of the note or 10 per cent of the balance due upon the note. We think the sum allowed by the chancellor is a reasonable fee, and therefore no more than that will be allowed by this court. We are not disposed to interfere with the allowance of attorneys' fees in the lower court, unless we can see that some injustice has been perpetrated. Such matters are to a great extent within the discretion of the court, and we will not interfere with the exercise of that discretion unless we think the allowance made is materially wrong.

In this case, the decree of the chancellor on the note was for more than \$13,000. Aside from the injunction sued out against the sale of this collateral hereinbefore mentioned, a protracted fight was made against the bank in this suit, much proof taken, and the bank's counsel put to much labor, and we do not consider the 10 per cent fee allowed to be excessive. It is, however, sufficient and the allowance will not be disturbed.

While the bill in this case does not specifically pray for the relief that the chancellor has granted to the complainant, nevertheless upon this bill and upon the cross bill all the facts that we have stated are made to appear,

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and under the prayer for general relief and to put an end to the litigation between these parties, we think the chancellor properly made this decree. It settles the rights of all the parties and ends this controversy, and will be affirmed and the cause remanded for execution thereof. Appellant will pay the costs of this court.

Sherman v. State.

JOHN W. SHERMAN v. STATE.
(*Knorrville*. September Term, 1911.)

1. **MURDER IN THE SECOND DEGREE.** Evidence sufficient to sustain conviction.

The evidence is stated, reviewed, and held to be sufficient to sustain a conviction of murder in the second degree. (*Post*, pp. 23-46, 60, 62.)

2. **CRIMINAL LAW.** Previous threats and acts of hostility do not constitute grounds of self-defense, when.

No matter how violent previous threats or acts of hostility against a defendant may be, they will not of themselves justify him in seeking and slaying his adversary upon the assumption that it is necessary to do so in order to save his life from the threatened danger; for to excuse the slayer, he must act upon an honest belief that it is necessary at the time to take the life of his adversary in order to save his own, and it must appear that there was a reasonable cause to excite this apprehension. (*Post*, pp. 43-46.)

Cases cited and approved: *Rippy v. State*, 2 Head, 217; *Williams v. State*, 3 Heisk., 376; *Jackson v. State*, 6 Bax., 457.

3. **ARGUMENT OF COUNSEL.** Can afford no ground for new trial where no objection was made or exception taken at the time.

Objectionable argument or improper remarks of counsel afford no ground for a new trial where no objection is made or exception taken at the time of the argument; and the same rule applies with equal force to gestures and the other conduct of counsel indulged in during argument. (*Post*, pp. 47, 53.)

Cases cited and approved: *Smith v. State*, 90 Tenn., 574; *King v. State*, 91 Tenn., 617; *Morgan v. Duffey*, 94 Tenn., 686; *Ferguson v. Moore*, 98 Tenn., 341.

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4. **SAME.** Truth of improper argument and fact of exceptions thereto must be authenticated in bill of exceptions; inclusion of written motion for new trial so alleging or charging does not establish the truth or fact.

The question whether or not due exception was taken to the objectionable argument or improper conduct of the State's attorney is one of fact. A charge or allegation of such matter in a motion for a new trial is not evidence of the matter; and it is not sufficient to make such charges, but the charges must be authenticated or established in a proper way. The mere fact that the written grounds of a motion for a new trial are included in the bill of exceptions constitutes no verification of the statements made in such motion; for such inclusion in a bill of exceptions only establishes that the statements or allegations were made on the motion, not that they are true. (*Post*, pp. 48, 49.)

5. **NEW TRIALS.** Facts and what transpired on trial cannot be established by affidavits upon motion for a new trial, but must be authenticated by trial judge in bill of exceptions.

It is a well settled rule of practice that an uncorroborated affidavit of a convicted defendant will not sufficiently establish any fact on a motion for a new trial, so as to justify the granting of a new trial thereupon; and what transpired on the trial cannot be established by the affidavits of the convicted defendant or his attorneys; for such matter must be authenticated by the trial judge, properly in narrative form in the bill of exceptions, and the fact of what was said and done in argument and the exceptions thereto can not be established by such affidavits, but must be authenticated by the trial judge in the bill of exceptions. (*Post*, pp. 49-53.)

Cases cited and approved: *Turner v. State*, 4 Lea, 209; *Brown v. State*, 85 Tenn., 439; *Hannum v. State*, 90 Tenn., 652, 653.

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6. **SAME.** Not granted for separation of jury in a criminal case where it is fully and satisfactorily shown that no prejudicial communication was had with them.

A separation of the jury in a criminal trial may be explained by showing that those separated had no communication with other persons, or that such communication was upon subjects foreign to the trial, and where every circumstance and surrounding of the jurors while separated is fully and satisfactorily explained in so far as their contact with others is concerned, and it is shown that no communication was had with them in any wise reflecting upon the case on trial before them, a new trial will not be granted upon the ground of such separation. (*Post*, pp. 53-58, 60, 62.)

Cases cited, reviewed, and approved: *McLain v. State*, 10 Yerg., 239; *Stone v. State*, 4 Humph., 26; *Hines v. State*, 8 Humph., 597; *McElrath v. State*, 2 Swan, 378; *Odle v. State*, 6 Bax., 159; *Cartwright v. State*, 12 Lea, 620; *King v. State*, 91 Tenn., 617.

7. **SAME.** Same. Separation of jury in taking a walk, going to see a furnace, or going to a show constitutes no ground for a new trial, when; case in judgment.

A separation of the jury by some of them taking a walk with an officer through the streets, while the others, with another officer, remained at the hotel; by some of them visiting a furnace, while the others stayed at the hotel, an officer being with each party, or set of separated jurors; or by some of them going, in charge of an officer, to a theater, while the others remained at the hotel in charge of another officer, constitutes no ground for a new trial of a criminal case, where it is fully and satisfactorily shown that no prejudicial communication was had with the separated jurors, and nothing occurred reflecting upon the case. (*Post*, pp. 53-62.)

See citation of cases under the preceding headnote.

8. **SAME.** Findings of fact by trial judge on motion for a new trial are binding upon the supreme court.

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It is an established rule that the findings of fact made by the trial judge on a motion for a new trial, where there is any evidence to sustain them, are binding upon the supreme court, even in criminal cases. (*Post*, p. 60.)

Case cited and approved: *Percer v. State*, 118 Tenn., 765 (and citations).

9. CRIMINAL PROCEDURE. Officers permitting separation of jury and jurors separating from body of jury should be fined and punished.

The conduct of officers in permitting the separation of the jury is reprehensible, and such officers so offending and the jurors separating from the body of the jury should be fined and punished by the trial judge, though there was no prejudicial communication or reflection upon the case constituting grounds for a new trial. (*Post*, p. 61.)

10. NEW TRIALS. Not for moderate use of intoxicating liquors by some of the jury in a criminal case when no juror is affected by it.

The drinking of intoxicating liquors by some of the jurors while trying a criminal case, when not used to excess but only in moderation, and where no juror became affected thereby, will not vitiate the verdict and constitutes no ground for a new trial. (*Post*, p. 62.)

Cases cited and approved: *Stephens v. State*, 4 Humph., 26; *Roe v. State*, 11 Humph., 491; *King v. State*, 91 Tenn., 617.

FROM HAMILTON.

Appeal in error from the Criminal Court of Hamilton County.—S. D. McREYNOLDS, Judge.

Sherman v. State.

LEWIS SHEPHERD, J. B. FRAZIER, MARTIN FLEMING,
and M. H. DOUGHTY, for Sherman.

ATTORNEY-GENERAL CATES and LITTLETON & LITTLE-
TON, for State.

MR. JUSTICE GREEN delivered the opinion of the Court.

The plaintiff in error was indicted in the criminal court of Hamilton county for the murder of Tom Norman. He was tried and found guilty of murder in the second degree, and his punishment fixed at ten years in the penitentiary. His motion for a new trial having been overruled, he has brought his case to this court for review.

The deceased was a brother-in-law of the plaintiff in error, the latter being a young physician in the city of Chattanooga. The killing occurred at Norman's store in that city, on February 5, 1911, shortly after noon, Sunday.

There were present in the store at the time of the tragedy, besides Norman himself, only Dr. Sherman and his chauffeur, Buddie Bachman. Buddie Bachman testified for the State and Dr. Sherman in his own behalf. The respective theories of the State and the plaintiff in error are fully stated in the testimony of these two witnesses. The circumstances of the killing can therefore be best presented by a brief resume of the evidence of Dr. Sherman and of Buddie Bachman.

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First, referring to the testimony of Dr. Sherman, it appears therefrom that he is a physician about twenty-five years of age, a man of medium stature, but some taller than was his brother-in-law, Norman. Norman was married to Dr. Sherman's sister in 1901 and they had several children.

The elder Sherman, the father of the plaintiff in error and of Mrs. Norman, was a native of Michigan, but removed to Chattanooga about thirty years ago. He was also a physician and appears to have been a man of some business sagacity, as he amassed and left at his death, about two years since, a considerable fortune. Dr. Sherman and Mrs. Norman were his only heirs. It is to be inferred from the statements of Dr. Sherman that his father died intestate and the doctor and his sister and their mother seem to have agreed among themselves that the estate of the elder Sherman should be equally divided among the three. Dr. Sherman qualified as administrator of his father's estate and, according to his testimony and that of his sister and mother, a division appears to have been effected among them without any friction, except that Norman was not pleased with the manner in which the plaintiff in error managed the business and appears to have expressed his disapprobation on frequent occasions.

Dr. Sherman testifies that on the morning of February 5, 1911, he was at the Eagle's Club in Chattanooga when he received a telephone message from his sister to the effect that Tom Norman, her husband, was acting in a

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peculiar manner and that she had consulted with her mother and that they wished the doctor to come out. Sherman then telephoned to Buddie Bachman to get his car out of a garage in the city and bring it around to the Eagle's Club for him. He states that he then went to George Beckert's saloon where Bachman found him, and they went to the home of his mother on the corner of Jefferson street and Chamberlain avenue, stopping the car on Chamberlain avenue. The house of Mrs. Sherman, the mother of plaintiff in error, was on a corner of these two streets, the store of Tom Norman was on an opposite corner, and the Norman residence about half a block up Jefferson street.

When the doctor reached this neighborhood, he stopped his car on Chamberlain avenue, and he and Bachman went into his mother's house. Bachman stopped in the front part of the house and began playing with one of the Norman children who was visiting her grandmother. Sherman and his mother went toward the rear of the house and engaged in conversation. He states that his mother told him that Norman had been drinking the night before, had come home very late and was acting strangely that morning. He says that his mother told him she feared that Norman would attempt to harm his wife in some way.

The witness says that he told his mother he would have a talk with Tom Norman and try to get him to go to town with him. He says that his object in wishing to talk with Norman was that he might get him away from

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home. After talking with his mother for some time, he sent Bachman up to the Norman house with the request that Norman come down to the store and let them have some coca cola. He had some whisky and wished to use the coca cola as a chaser. Buddie returned with the report that Norman said he did not have any coca cola. Sherman then wished to know why Bachman did not find out whether Norman had any other kind of soft drink that they might use in the place of coca cola. Buddie had not thought of this and Dr. Sherman asked him to return and see if they could bet something else, to which Buddie said, "Why don't you go yourself?"

Referring again to Norman's actions on the morning in question, concerning which he had been telephoned, the plaintiff in error says that his mother told him that Norman had requested his wife to send everybody away from the house—servants and children—that they might eat their last dinner together, and that this was what had alarmed the sister and mother and caused them to telephone for him.

He and Bachman went together up to the Norman house after Bachman had returned from his unsuccessful coca cola mission, and when they arrived there, they found the family sitting in the back room where they all talked in a friendly and general way for some time. Mrs. Norman then announced that dinner was ready and invited them all into the dining room. Bachman and Dr. Sherman both replied that they had been to dinner, and declined the invitation.

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Sherman says that Norman declined to eat dinner and volunteered to go down to the store with them, saying that he could fix them up; meaning that he could supply them with something else to use in lieu of the coca cola as a chaser for the whisky.

Witness testifies that he, Norman, and Bachman walked down to the store in a friendly manner; that Norman took a key from his pocket, unlocked the door and let them in, and after they had entered, Norman locked the door and put the key in his pocket, which latter action Sherman thought was strange and he says it caused him some concern.

After entering the store, the witness reached down in a case and procured a bottle of ginger ale. He took out his whisky and offered Norman some, which the latter declined, saying: "That's what's the trouble with me now, I've got too much." Sherman then handed the bottle to Bachman who took a drink and returned it to him and he took a drink and then took the ginger ale for a chaser.

Norman was at this time behind one of the counters in the store where he had walked upon their entrance.

It appears that there is a room in the rear of the front store room, and Dr. Sherman states that he walked back into this room and invited Norman back there to have a game of checkers, which Norman declined. It seems that the two had played a game of checkers on the Friday night previous, which had resulted in a draw, and the doctor invited the deceased back to play off the

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draw. Witness testifies that his only object in offering Norman a drink and inviting him back into this room to play a game of checkers was to show his friendly feeling and to get Norman in a friendly mood.

Dr. Sherman says that after returning from this back room into the store room, he invited Norman to ride with him and Bachman back to town. Norman did not reply. The witness then asked Norman for a cigar, got it and paid for it, when he (Norman) reminded him that he had forgotten to pay for the ginger ale. He had given him a nickel for the cigar and the witness then handed Norman a dime and Norman ran his hand into his pants pocket bringing out some change and handing a nickel to the witness. At this time, Norman was behind the counter and the plaintiff in error out in front. They were facing each other on either side of the counter.

Dr. Sherman says that he then turned with the intention of going out the front door, and that Norman walked back toward the rear end of the counter; and that just before Norman reached the end of the counter, he (Sherman) heard Norman say: "I'm going to kill the whole damn family, and you first." Whereupon the witness said that he turned around, pulling out his pistol at the time Norman was coming around the end of the counter out into the center aisle, and began to shoot, firing the pistol as many times as it would shoot. He said that as Norman reached the end of the counter, he made some kind of motion like he was getting something out of his pocket and that he thought he saw an object

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in Norman's hand and that Norman was going to kill him.

To use the language of the plaintiff in error in describing this tragedy, he says:

"As he (Norman) came around the end of the counter, I pulled the pistol from my pocket. As soon as he made this move, I jerked the pistol from my pocket—from my hip pocket—and began to fire, and he was coming toward me all the time while I was firing the last shot. When I fired the last shot, he was standing with his left side toward me. As I fired the last shot, he had one hand behind him, like this,—(indicating) and the other in front of him, raised in that position—I should think he took about two or three steps while I was firing."

According to the witness, the only language that the deceased used on this immediate occasion was that just above quoted, to the effect that he was going to kill the whole damn family, just before he started around the counter. The witness says that after the shooting he sent Bachman into the rear room Norman had gone, directing him to get the key to the door away from Norman; that Bachman returned with the key and that they went out the front door and he locked it and went over to his mother's; that he told her Norman had tried to kill him and he had shot him, requesting her to go over to the store and see about him. He says she told him she was not able to do this and he then gave the key to a man named Leutgens, who was nearby, telling him the same thing about shooting Norman that he had told his

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mother and asking him to see about Norman and see what he could do for him.

He says that he then got into the car with Backman and went to George Beckert's residence. Not finding him there, he went to Beckert's saloon; that he then went to Esquire Bork's to surrender, and sent Bachman and Beckert out to the residence of Judge Fleming, his lawyer.

The witness denied that he said anything to Bachman about the killing on the way to town and stated that their conversation was general.

During the course of his testimony, Dr. Sherman detailed many threats on the part of Norman against him and the Sherman family, which had been communicated to him previous to the killing, to the effect that Norman would kill him. These will be mentioned later in the opinion, as well other parts of the testimony of the plaintiff in error. He claimed that Norman was a violent character and that he was very much in fear of him; that he thought Norman was attempting to draw a weapon on him; and that he believed he shot him in his necessary self-defense. Such in brief is the testimony of the plaintiff in error, which presents the entire theory of his case.

The witness Bachman, introduced for the State, contradicts the testimony of the plaintiff in error in many of its essential details, particularly as to what occurred in the store.

Bachman testified that he was eighteen years old; that he had lived in Chattanooga for about thirteen or four-

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teen years; that he had been in the employ of Dr. Sherman for some time, collecting for him and acting as his chauffeur; that on the morning of the killing he was eating his dinner when Dr. Sherman telephoned to him to get the machine quick and bring it around to the Eagle's Club; that he went back and finished his dinner and then went to the garage after the machine and proceeded to the clubhouse. Not finding the doctor there, he located him at George Beckert's saloon. The doctor then got into the machine and they drove to Mrs. Sherman's house.

The testimony of Bachman and Dr. Sherman is in substantial accord as to what happened at the Sherman house. Bachman said he stopped in the front part of the house to play with the little girl while Sherman went toward the kitchen and had a conversation with his mother. Bachman also agrees that Dr. Sherman sent him up to get Tom Norman to go down to the store and let them have some coca cola; that he returned reporting that Norman had no coca cola; and that he and Dr. Sherman then went together to the Norman house.

The witness says that they went into Norman's house, the latter was sitting down, together with his wife who had the baby in her lap. He says that both Mr. & Mrs. Norman invited them in to dinner, which they declined; and that Sherman again asked Norman about the coca cola, to which Norman replied that he did not have any coca cola, but had some red soda at the store. Bachman says that Mrs. Norman then said: "Well, go down and get some then, Tom." He said that the doctor, Norman,

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and himself went to the store and when they got there, Norman unlocked the door and they went inside. Bachman says that Dr. Sherman at this time said: "You'd better lock the door, I've got some whisky here and don't want anybody to see us drinking it." He says that Norman then locked the door as requested.

Bachman gives pretty much the same account that Dr. Sherman does as to the latter inviting Norman to take a drink and Norman's refusal, saying he did not want any. Bachman says that he then tasted the whisky and Dr. Sherman drank pretty much all that was left in the bottle, and asked Norman where he should put the bottle. Norman said he would put it behind the counter where no one could see it. The witness states that Dr. Sherman then walked into the back room and called to Norman inviting him to play checkers, which Norman refused; that this invitation was repeated several times and each time refused. Sherman then came out of the back room and bought a cigar from Norman for which Sherman handed Norman a nickel and the latter said, "You haven't paid me for the ginger ale." The witness then tells about Sherman giving Norman a dime and Norman reaching down in his pocket to get a nickel to give back to him. Witness, however, stated that Norman had the key to the door in his hands at the time and shifted it from one hand to the other in making this change.

During this conversation Norman was behind the counter. Buddie says that the deceased then remarked:

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"I have got to be in town by two o'clock," starting around the end of the counter. Sherman then called out: "Bud:" when the witness looked at him and saw him with a black pistol extended in his hand. Norman threw out his arms at this time, according to this witness, exclaiming: Don't do that! Don't do that! You frighten me."—holding the key in his right hand, when Sherman began shooting and Norman "kinder done like he was trying to get to him and turned around this way, ran into the back room and fell up against the stove—sat up against the stove."

Bachman then says he asked Sherman if they were blanks he was shooting, to which Sherman answered: "No, you damn fool you, they are real bullets."

The witness says that Sherman told him to go into the back room and get the key, and as he went into the room Norman said: "O Lordy, Buddie, what does he mean? What did he do it for?" Buddie says that he asked Norman for the key, taking it out of his hand. He unlocked the front door and he and Sherman went outside.

Bachman referred to the statement, that Norman made a motion toward his hip pocket, as "a lie," and likewise characterized the statement that Norman said he was going to kill the whole damn family, just as he started around the counter.

The witness said that when they went out of the store, Sherman said to him: "Don't you say anything about what happened in here until you get in the court room."

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Bachman said: "What shall we do?" Sherman replied: "Lock the door or he will come out here after me." Bachman then locked the door and handed the key to Sherman who said: "That is some nerve, aint it kid?"—and went over to speak with his mother. He corroborated Dr. Sherman's story as to what he said to his mother and his subsequent conversation with Mr. Leutgens, requesting the latter to look after Norman.

Bachman says that he then cranked up the machine and he and Dr. Sherman got in and started to town, whereupon Dr. Sherman began to tell him what he must say, or testify to, in regard to the happenings in the store. He told witness he must say that Tom Norman said he was going to kill the whole damn bunch, and "me first," and he also told the witness to say that witness took the key out of Norman's pocket and to say that Norman reached in his hip pocket for something. Sherman also told Bachman, according to the latter, that he would take him to Detroit and show him a good time, saying that he had plenty of money, and adding: "If you don't tell what I told you, it won't be good for you."

This briefly is the testimony of Bachman, which, if it is to be believed, utterly destroys the theory of self-defense urged in behalf of Dr. Sherman.

Bachman's testimony is very vigorously attacked by counsel for the plaintiff in error. It appears that after reaching the city on the afternoon of the tragedy and after the services of Judge Fleming were secured, that

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Bachman made a statement to the judge with reference to the circumstances of the killing which was in substantial accord with the statement of Dr. Sherman heretofore detailed. Furthermore, at the preliminary hearing, he testified to the same effect and there is evidence tending to show that he made a statement of like import to Judge Shepherd, another of defendant's counsel, and perhaps to some one else after this occurrence.

It is further said that Bachman was jointly indicted with Dr. Sherman for this killing, placed in jail, and, that in consideration of his reversing his previous statement, the district attorney released him on straw bond and discontinued the prosecution of the case against him, and it is urged that Bachman's testimony given upon the trial was induced by this action of the State, and is therefore not to be credited.

Bachman made an explanation of his statement to counsel and of his statement on the preliminary hearing, which was to the effect that he was afraid of Dr. Sherman and that these prior statements of his were made at Dr. Sherman's instance. He refers to his former statements as the "lie doc told me to tell" and says that he told this "same lie" on the various occasions referred to. He further states that when he was put in jail he did not especially mind being there, but says that he could not stay there with "that lie in my system, it was choking me." He then said that he told his people when they came to see him that he was going to tell the district attorney-general the truth about it, for he said "that lie

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was hurting me." The district attorney-general and other counsel for the State then called on him and he made the statement to them which he made upon the trial.

It must be remembered that this boy was an immature youth, eighteen years of age, in the employ and manifestly very much under the influence of Dr. Sherman, and, from the way in which he refers to his employer, he was attached to him. The jury doubtless believe the story that Buddie Bachman told on the trial of this case. The language that he used in explanation and in disavowal of his former statements to defendant's counsel and on the preliminary hearing was so artless and boy-like that it seems impossible to have been put into his mouth by any interested person. It is so spontaneous and simple an explanation that we are not surprised the jury accepted it as true, and lent credit to the testimony which he last gave on the trial. The case of the State does not depend, however, on the testimony of this young boy. Certain facts are conceded by the plaintiff in error. Among them are these:

On the Sunday morning in question the plaintiff in error procured the pistol and a bottle of whisky. Taking his chauffeur, he drove in his machine out to the corner of Jefferson street and Chamberlain avenue. He went into his mother's house and sent Bachman up to Norman's to try to get the latter to come down to the store.

When Norman did not come in response to the boy's visit, Dr. Sherman himself went to see him and induced

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him to come to the store. When they reached the store, Dr. Sherman invited Norman to take a drink with them, which was declined, then took some whisky himself. Dr. Sherman then tried to get Norman to come into the rear room of the store, which Norman also declined to do; and later, as Norman walked out from behind the counter in the store, after selling Dr. Sherman a cigar, the latter opened fire upon him with his pistol, killed him, and upon Norman's body was found no weapon, nor is it insisted that he was armed at the time.

So, that the theory of self-defense offered in this case rests upon very narrow ground. It is based altogether upon Norman's supposed dangerous character, previous threats, and the threat alleged by Dr. Sherman to have been made just prior to the killing, accompanied by a motion of his hand as if to draw a weapon, which the plaintiff in error ascribes to the deceased.

Manifestly, if Norman came around the counter and, making a threatening demonstration, advanced upon Dr. Sherman as the latter claims, then Norman could not have received the wounds from which he died elsewhere than in the front, or at any rate, the side of his body. There is a conflict of testimony as to where these wounds were received; that is, as to where the bullets penetrated the body.

The pistol that Dr. Sherman used was an improved 32.20 Smith & Wesson and all the shots received by Norman passed entirely through his body and none of them

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lodged therein. The controversy arises over whether the wounds were received from the front or from the rear.

Immediately after Norman was shot, two or three physicians were summoned who made an examination of him. He lived some forty-five minutes after receiving his wounds. The physicians making this examination testified that they were of opinion that the bullets entered the body from the front and side. They said, however, that this examination was made rather with a view of ascertaining the character of his wounds; that is to say, whether they were fatal and whether anything could be done for him, than with a view of determining the course of the bullets by which he was stricken. Upon cross-examination, two of these physicians present at the time conceded that their examination was superficial. The third physician present, although his deposition had been taken, was not heard from, the deposition being excluded upon the objection of the counsel for defendant.

Norman's body was prepared for burial and embalmed by an undertaker in Chattanooga. It was placed in a coffin and hermetically sealed. About a week afterwards it was exhumed and a *post-mortem* examination had. There was present at this *post-mortem* the undertaker, three eminent surgeons or physicians of the city of Chattanooga and some of the counsel for the prosecution. The doctors making this *post-mortem* examination testified that the body was in a perfect state of preservation; that they subjected it to a thorough examination and that they were able to trace and conclusively determine

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the course of the bullets by which Norman received his death.

There were ten external wounds in Norman's body, made by five bullets. Two of these wounds were in the back, close to the backbone. There were corresponding wounds in front of the body. Another wound was between the sixth and seventh ribs, on the left side, a little back of the median line and there was a corresponding wound on the right side between the eighth and ninth ribs. There was another bullet hole through the left arm, making a wound to the rear of the left arm and a corresponding wound on the other side of the arm. The other wounds were in the right thigh.

The physicians performing this autopsy testified that they were able to trace the course of the bullets through the body in several different ways. They stated that the peritoneum, which is the thin lining of the abdominal cavity, was punctured by two of these bullets and was pushed outward. They illustrated this by pushing a pencil through a sheet of paper so that on the opposite side of the paper from which the pencil entered the hole was stellated and the edges pushed out, and they said that the peritoneum was found in this same condition, just like a sheet of paper through which a pencil point had been driven. This they said was conclusive evidence that the bullets had come from the rear and passed outward through the peritoneum.

It further appeared that the bullet which entered the left side to the rear struck the liver and that the point of

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entrance where it struck the liver on the left side was small and the point where it emerged on the right side was larger and stellated. They were also able to trace the bullets by the location of splintered bone.

Other facts were set out by these experts, introduced for the State, from which they say that they were able to testify beyond any doubt that these bullets entered the body of Norman from the rear.

Expert testimony was introduced by the defendant below, which tended to contradict the evidence of the State's experts, the principal contention for the defendant being that on the examination made before the burial of Norman's body by the attending physicians it was found that the wounds in the front of his body were smaller than those at the back and these experts, for this reason, concluded that his wounds were received from the front. All of them, however, practically, conceded that it is not an invariable rule that the point of entrance of a bullet into a human body is smaller than the point of exit. Some of them also undertake to state that the embalming fluid used upon a dead body is calculated to destroy any evidence that the bullet might leave there as to its course. This is contradicted.

It is not possible, within the limits of a judicial opinion, to fully review and compare all this expert testimony, but after a careful examination of it all, we think that the jury would have been fully warranted in accepting the evidence offered by the experts introduced for the State, rather than that offered by the defendant's

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experts. The expert witnesses for the State appear to have reasoned out their conclusions more closely and more satisfactorily than do those presenting the opposite view, and they appear to have had more experience in matters of this sort.

So that, if the jury accepted their testimony and their views as correct, we have no inclination whatever to disturb the verdict on this account.

Certain it is that the evidence of the State's experts as to the point of entrance of these bullets seems to harmonize entirely with Bachman's testimony that Norman was making no attack on Sherman when shot, but that almost immediately, when the shooting began, Norman turned and sought to escape to the rear room.

There are some other matters, however, of ordinary observation and experience, easily to be understood by the lay mind, which seem to demonstrate that these wounds were received from the rear. For instance:

There were two holes in the back of Norman's shirt, which was identified, these two holes corresponding with the wounds in his back. There were, however, no holes in the front of his shirt corresponding with the wounds in his stomach and abdomen. The conclusion, therefore, must follow that these two shots were received by Norman from the rear; that they passed through his body, but their force was so spent, that, after emerging, they did not pass through his clothing. As a matter of course, had he been shot from the front, there would have been holes corresponding to his wounds, in the front of his shirt.

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In addition to this it is conceded that the wounds in the front of Norman's body are lower than those in the rear. Dr. Sherman, it will be remembered, was a taller man than Norman and, standing up with his arm extended, he must have shot Norman in the rear of the body, since the bullets had a downward range. In order to reconcile the fact of the wounds in Norman's back being higher than those in the front of his body—in order to reconcile this fact with the theory of plaintiff in error that Norman received his wounds from the front, it would be necessary for Dr. Sherman to have been stooping down and shooting upward, or else holding his pistol in an unheard of manner.

These circumstances and the testimony of the experts introduced for the State tend strongly to corroborate the testimony of Buddie Bachman and to establish the State's theory.

Beyond all this, it appears that after Norman was shot he went into this little room back of the store where several people saw him before he died, among others the witness Crox, an officer. Crox stated that when he came into the room, Norman was lying on his side and said: "Who is talking?"—and upon being told that it was Crox, Norman replied: "Go and catch him. He killed me without a cause." It is conclusively shown that Norman was aware of his impending dissolution at this time and the language used by him if not *res gestae*, may be received as a dying declaration in further confirmation of the State's theory of this tragedy.

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To Sam Bragg, under the same circumstances and at the same time he said: "They shot me in my tracks."

And to Buddie Bachman, when he went back as heretofore related, Norman said: "O, Lordy, Buddie, what does he mean? What did he do it for?"—thus indicating that he was entirely unconscious of having given to the plaintiff in error any cause for taking his life.

From the foregoing it must be apparent that the jury were well warranted in discrediting the testimony offered by Dr. Sherman as to the immediate circumstances of this tragedy.

The greater part of the testimony introduced for the defendant below consists of the statements of witnesses as to threats alleged to have been made against Dr. Sherman and other members of the Sherman family by the deceased, the principal witness being Mrs. Norman herself, who admits on cross-examination that she is very much in sympathy with her brother and wants to aid him. No feeling of resentment or particular regret for the killing of her husband appears at any place in her testimony. She states that Norman had threatened her life—that he had attempted her life; that he had attempted the life of her mother; that he had attempted the life of her brother, and, upon the whole, makes him out a very desperate character.

A very striking circumstance in this record appears in the testimony of Mrs. Sherman, Mrs. Norman's mother, and that is that some time ago Mrs. Norman went to consult a leading member of the Chattanooga bar with

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reference to procuring a divorce from her husband, but it seems that no steps whatever were taken and the inference is that Mrs. Norman was advised by the attorney that no grounds for a divorce existed and that this effort was dropped. As a matter of course, if the deceased had been guilty of any such conduct toward her on previous occasions as she ascribes to him in her testimony on this trial, this effort on her part to obtain a divorce would not have been so dropped. She would have been entitled to a divorce and it is obvious that she had the disposition to procure it. It is evident from the entire record that she was tired of Norman. That he was a man addicted to drink; that he was to some extent troublesome and quarrelsome may be conceded from the proof in this case, but that he was to any degree dangerous or that any of these persons should have had any great fear of him is not very probable. In Mrs. Norman's testimony she relates an indictment of his making an attack upon her brother with a pair of brass knucks, and then says that she went in and disarmed him, taking the knucks away from him and quieting him down. Then too, on the very day of the killing, it seems that he went to the store at her suggestion and under her direction to get the soda pop for Bachman and her brother. So Norman was not altogether intractable.

The plaintiff in error seeks to make it appear that he feared Norman to such an extent that he left his mother's house and took up his abode in town. It seems, however, that when he went to town, he resided at the Eagle's

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Club, and we hear of him principally at that club and George Beckert's saloon. It is therefore plausibly urged by the State that a disposition to minister to his own pleasure and enjoyment, rather than fear of the deceased, induced Dr. Sherman to leave his home.

Furthermore, it is apparent from the testimony of Mrs. Sherman that she was an old lady, nervous and feeble, and required much attention. It would seem, therefore, that had the plaintiff in error been so solicitous to protect his mother and sister from Norman as he would make it appear on this trial, he would never have left this old lady alone merely through fear of personal danger.

The threats which Dr. Sherman claims were made against him appear to have covered a period of three years or so before this tragedy, and, according to the testimony introduced by defendant below, none were ever executed, so that they were so frequent as to have lost all their force. No man who for years threatens and never performs can continue to inspire fear. His threats are regarded as idle. As indicated before, much of the threatening language ascribed to the deceased has been discredited in various ways upon this record and we are not convinced that Dr. Sherman really stood in any serious fear of him. Sherman played a game of checkers with him on Friday night before the killing, and it is certain that he induced the deceased to come to the store on the day of the killing and invited him into the back room to play another game of checkers with him and also in-

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vited him to go off with him in his automobile. None of these actions suggest a greatly frightened man.

No matter how violent previous threats or acts of hostility against a defendant may be "they will not of themselves justify him in seeking and slaying his adversary upon the assumption that it is necessary to do so in order to save his own life from the threatened danger. To excuse the slayer, he must act upon an honest belief that it is necessary at the time to take the life of his adversary in order to save his own, and it must appear that there was a reasonable cause to excite this apprehension." *Jackson v. State*, 6 Bax., 457; *Rippy v. State*, 2 Head, 217; *Williams v. State*, 3 Heisk., 376.

From the evidence heretofore quoted in this opinion, the jury was well warranted in concluding that there was no reasonable cause to excite the apprehension of Dr. Sherman at the time he did this shooting. There is no suggestion of such a cause save in his own testimony, and that was so contradicted, the jury was justified in rejecting it entirely.

Concluding this review of the facts of the case, we are fully satisfied that the verdict of the jury is sustained by the proof.

Passing from the facts, we find numerous other errors assigned by counsel for the plaintiff in error, those from 2 to 9 inclusive being with reference to the argument of the district attorney. It is said that he used much unwarranted language in his closing address to the jury; that he made objectionable demonstrations with knives

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which belonged to Norman but were brought into court by the defendant below; and that he addressed unseemly language to defendant's counsel in the presence of the jury; and that he undertook to introduce a model or dummy before the jury upon which to hang the clothes of deceased, the model having been previously excluded by the trial judge upon the hearing of the testimony. All of these objections may be said to be objections to the argument of the district attorney, either to his language, his gestures, or his conduct during argument, and they may all therefore be treated alike.

It is thoroughly settled, under our practice, that objectionable argument or improper remarks of counsel afford no ground for a new trial where no objection is made or exception taken at the time of the argument. *Smith v. State*, 90 Tenn., 574; *King v. State*, 91 Tenn., 617; *Morgan v. Duffey*, 94 Tenn., 686; *Ferguson v. Moore*, 98 Tenn., 341.

The same rule applies with equal force to gestures and the other conduct of counsel indulged in during argument.

An examination of this record discloses that there is no evidence from which this court can conclude that the foregoing rule was complied with, nothing to show that seasonable objection, or any objection at all was made to the argument of the district attorney at any time during the progress of the trial.

From the bill of exceptions, it appears that the defendant below entered his motion for a new trial on the min-

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utes of the court, and filed with the clerk in writing, his reasons for urging a new trial.

The third ground was, "for misconduct on the part of the attorney-general in his closing speech to the jury, as shown by extracts from his address which will be filed as a part of or exhibit to this paper."

The fourth ground of the motion relates to the gestures of the district attorney with the butcher knife; the fifth ground to his conduct in hurling the clothes which deceased wore around in front of the jury; and the sixth ground relates to the conduct of the district attorney with reference to the dummy or model which has heretofore been spoken of.

There are other grounds of motion for a new trial which need not be noticed in this connection.

Following the grounds of the motion for a new trial in the bill of exceptions appears several pages headed:

"Exhibit to Motion for a New Trial."

In this exhibit is contained several pages alleged to be quotations from the district attorney's speech, and in the exhibit there is also a relation of his objectionable conduct complained of on the motion for a new trial; such as gesticulating with the knives, etc.

At the conclusion of each of these quotations from the speech and at the conclusion of each reference to the district attorney's physical demonstrations, in this exhibit, there follows a statement that exception was taken at the time by defendant to the language or conduct of the district attorney, but the exception was overruled by the

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court. It nowhere else, nor in any other manner, appears in the record that any exception was taken by defendant on the trial to the action and language of the district attorney in his argument to the jury.

The highest dignity that can be given to this exhibit is to treat it as part of the motion for a new trial. It really is nothing more nor less.

The question whether or not due exception was taken to the language and behavior of the district attorney is one of fact. A charge or allegation of such matter in a motion for a new trial is not evidence of the matter, any more than is a like charge of separation of the jury or intoxication of the jury evidence of such separation or intoxication. It is not sufficient to make such charges, but the charges must be authenticated or established in a proper way. There is no authentication whatever upon the record of the statements that exception was taken at the time to any portion of the argument of the district attorney. The mere fact that the written grounds of a motion for a new trial are included in the bill of exceptions constitutes no verification of the statements made in such a motion. Such inclusion in a bill of exceptions only establishes that the statements or allegations were made on the motion, not that they are true.

In the affidavit of the defendant below, filed on the motion for a new trial, occurs the following:

“He files herewith a transcript, a part of the closing speech of the attorney-general delivered to the jury at the trial and submits to the honorable court that it was a

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grievous error to allow the attorney-general to indulge in the terrible and unwarranted invective against him. It was error to allow him to make statements which were unwarranted by the evidence and to stir up the feelings of the jury against him by his demonstrations before the jury. Affiant avers that the demonstration complained of was made in the very presence of the court and over the reserved objections of his attorneys, and no further evidence of this occurrence is needed than the knowledge gained by the honorable court from an actual observation, but affiant, that no mistake might be made in this regard submits as correct a description of it as a stenographer can make."

It will be seen that the defendant in this affidavit does not undertake to make oath to any fact except that the transcript, by which it is to be presumed he means the exhibit to his motion, contains an accurate account of a certain demonstration made by the district attorney. Probably he refers to the demonstration with the dummy, or perhaps he may refer to the demonstration with the knives. This affidavit, by the most liberal construction, cannot be said to verify the alleged quotation from the speech of the attorney-general, any more than it can verify the interpolations in the exhibit that all this language was excepted to at the time it was uttered.

If, however, we concede that it was the intention of the defendant below to make oath to the truth of the entire contents of his motion for a new trial, including the exhibit thereto, still, under the well settled practice of this

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court, and uncorroborated affidavit of a convicted defendant cannot be looked to to establish any fact on a motion for a new trial. *Brown v. State*, 85 Tenn., 439; *Hannum v. State*, 90 Tenn., 653.

In two cases, the practice of allowing attorneys to undertake to prove what transpired on the trial by affidavit is discountenanced, and it is said that the proper way to incorporate into a bill of exceptions such matter is to have the judge to insert it over his own signature. *Turner v. State*, 4 Lea, 209; *Hannum v. State*, 90 Tenn., 652.

Nowhere, so far as we know, has it ever been thought that an uncorroborated affidavit of an unsuccessful defendant could sufficiently establish a fact to justify a new trial thereupon.

As to these matters occurring during the trial in the presence of the court, the trial judge is the proper witness. Such matters must not be brought into a bill of exceptions merely by affidavits of parties or of counsel, but to be considered in this court, they must otherwise appear in the bill of exceptions, properly in narrative form. To such parts of a bill of exceptions, the attention of the trial judge is always directed, as no bare narration can be therein included without his authority, and he vouches for the accuracy of everything so stated. In any event, the trial judge must in some way certify or verify the actual occurrence of all things enacted in his presence upon the hearing, if such things are to be made the subject of complaint here.

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Looking to this bill of exceptions, it really contradicts the statements contained in the exhibit to the motion for a new trial, that exception was taken at any time to the argument of the district attorney by the defendant below. We find in the bill of exceptions, at the beginning of the proceedings on the motion for a new trial, a statement from the district attorney,—that he understands the court puts in the bill of exceptions what he said, and afterward referring to this exhibit, which must have been read as a part of the motion for a new trial, the district attorney says:

“It is just parts of my speech.”

The court replied:

“I will put in what occurred there.”

At the conclusion of the bill of exceptions we find the following paragraph:

“The court ordered that the complete speech of the attorney-general be inserted, as follows:”

Immediately there follows what is manifestly a stenographic report of the entire speech of the district attorney made on the trial below. It is obviously intended to be a complete report of this speech and what occurred during its progress. There are many interruptions noted therein. There appear colloquies between the district attorney and defendant’s counsel. There also appear references to the district attorney’s demonstration with the knives and his efforts to bring in the dummy. There also appear therein many interruptions by the court and some remarks that the court made to the dis-

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trict attorney during the progress of his argument, but nowhere therein does it appear in any part of the speech that any exception was taken to the language or conduct of the district attorney by defendant's counsel.

This stenographic report was inserted by the direction of the court and it is styled the "complete speech" of the district attorney, and we must look to it to ascertain what occurred during the progress of that speech, so that not only do we find no evidence in this record that seasonable exception was taken to the language or conduct of the district attorney, but as a matter of fact, we find evidence to the contrary.

This being so, under well settled practice, we cannot consider the objections that the plaintiff in error makes to the closing speech of the district attorney. Assignments 2—9 are accordingly overruled.

The 10th and last assignment of error is with reference to the conduct of the jury during the trial of this cause. The most serious complaint made is as to the separation of the jury. It is said that part of the jury walked with one officer through the streets of the city while the remainder of them, with another officer, were at the hotel; that some of them went to visit the Citico furnace while others stayed at the hotel, one officer being with each party; and that on one occasion five of the jurors went in charge of an officer to a vaudeville show in Chattanooga while the others remained at the hotel in charge of the other officer.

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The question of the separation of juries is one that has been discussed a great deal by the courts and a number of cases have arisen in this State.

Under the common law the rules on this subject were very rigid, but a review of our cases will show that they have been to some extent relaxed.

One of our earliest cases is that of *McLain v. State*, 10 Yerg., 239. In that case there had been a repeated separation of several of the jurors from their fellows without the care of an officer, for the space of fifteen or twenty minutes at a time. A new trial was granted and it was held that it was not necessary for the prisoner to prove that they were during their absence subjected to improper influence from others. There was no effort on the part of the State to show that they had *not* been subjected to any improper influences during their absence or that they had *not* had any communication with outsiders; in other words, no attempt on the part of the State to explain these absences. A new trial was granted.

The next case is that of *Stone v. State*, 4 Humph., 26. The question there was whether one juror being seen whispering to a third person and another being seen asleep for an unascertained period of time were good causes for a new trial. With reference to the first objection, the court found that the whispering complained of took place in open court and that it was impossible, from the facts stated, that the juror could have been tampered with, as the subject of conversation was satis-

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factorily shown to have been relative to the health of the juror's family. The court did not discuss the matter of the other juror's falling asleep. It was there observed by Judge Turley:

"A great deal, first and last, has been said about the beauty and purity of trials by jury, and with truth; and our ancestors were so jealous of its preservation that many absurd practices relative thereto were introduced into courts, which like many other abuses retain possession of them for a long time; among the rest, the practice of not allowing jurors meat and drink until their verdict was rendered. But these restrictive principles have been broken down in most of the States of the union and even in England; and the purity of jury trials made to depend, not upon form, but substance. That they have still been preserved in this State and New York to the extent shown in the case of *Brant v. Fowler*, 7 Cow., 562, is more a matter of amusement than serious reflection."

In the case of *Hines v. State*, 8 Humph., 597, the court again discusses this question of separation of the jurors. Referring to the cases just cited and then formulating certain rules by which questions of this character were to be determined, the court held the true principles to be:

"1st: That the fact of separation having been established by the prisoner, the possibility that the juror has been tampered with and has received other impressions than those derived from the testimony in court exists and *prima facie* the verdict is vicious."

"2nd: This separation may be explained by the prosecution's showing that the juror had no communication

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with other persons; or that such communications were upon subjects foreign to the trial and that, in fact, no impressions other than those drawn from the testimony were made upon his mind.”

“3rd: In the absence of such explanation, the mere fact of separation is sufficient ground for a new trial.”

In *McElrath v. State*, 2 Swan, 378, the prosecutor in the case, during the process of the trial, spent a night in the room with the jury. The court was of opinion that it could not tolerate a verdict obtained from a jury with whom the prosecutor had associated and held communication during the progress of the trial. The prosecutor filed his affidavit undertaking to set up that he had used no influence upon the jurors prejudicial to the defendant, but the court thought that in so flagrant a case the explanation should be very ample and satisfactory and was of opinion that the affidavit before them presented no such full and sufficient explanation.

In the case of *Odle v. State*, 6 Bax., 159, the jury was taken to board at a small two-room house, at which place the prosecutor and his two daughters also came to board. The two daughters were both witnesses for the State. It was necessary for some of the jurors to eat in one of the rooms along with the prosecutor and the two daughters. The verdict in this case was set aside, it appearing that the affidavit offered by the prosecutor and his two daughters as to their association with the jurors was unsatisfactory to the court. They gave no explanation whatever of the suspicious fact that they selected this small

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house, where the jury was staying, in which to board, when, as a matter of fact, there was not room enough for the jury. In this case, the principles laid down in *Hines v. State* heretofore quoted are expressly reaffirmed and approved.

In *Cartwright v. State*, 12 Lea, 620, it was said:

“It is the opportunity of tampering with a juror afforded by the separation which constitutes the ground for a new trial, but if such separation afforded no such opportunity, there can be no cause for a new trial.” It was there charged that one of the jurors was sitting on a veranda alone, which was outside the room in which the remainder of the jury were quartered. But it appeared that this veranda was on the second floor and could not be communicated with save through the jury room. Therefore, there was no opportunity for any one to tamper with this juror.

In the noted case of *H. Clay King v. State*, 91 Tenn., 617, the jury, during the trial, went beyond the border of the State, taking a ferry boat and crossing the river into Arkansas. They there remained for a few minutes, walking around, and then recrossed to the Tennessee bank. As a matter of course, when this jury was in Arkansas, a foreign State, it was in law at least dispersed, for the officers were without jurisdiction and could exercise upon the members of the jury no control whatever. Being in Arkansas, the jurors could not be restrained and could act as they saw fit, but, as a matter of fact, it was shown that no one communicated with

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them or attempted to communicate with them, and it was therefore said:

“The case was taken thereby without the rule which vitiates the verdict only when a separation is unexplained.”

It is apparent, therefore, from a review of the cases, that the rule long ago announced by this court has been in full force and effect ever since, and that a separation of the jury may be explained by showing that those separated had no communication with other persons or that such communication was upon subjects foreign to the trial.

Oral evidence was heard by the circuit judge upon the motion for a new trial with reference to this separation of the jury, and, with abundant evidence to sustain him, the circuit judge made a written finding of fact as follows, appearing in the bill of exceptions:

“Another ground set forth is that the jury did not pretend to stay together, some of them taking long strolls through the city, while others stayed at the hotel. Complaint is made to this court that at one time eleven of the jurors walked out to the Citico furnace. There were two officers Mr. Gross and Mr. Kirklin, one of these officers stayed with a crippled juror at the Tscopik hotel where the jury had quarters, the other being in charge of the jurors going to Citico furnace. The proof shows that *they did not come in contact with, or have any communication, directly or indirectly, with any one, on that trip.*”

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Parenthetically, it should be stated here that it is conceded that as to the crippled juror, there was an agreement that he might go to and from the court room in a cab and be handled generally separate from the others when necessary. We understand that no complaint is made on this record as to him or his separation, except as to one occasion when the officer was away a few feet from him in the corridor of the courthouse. It is conclusively shown, however, that at that time the crippled juror had no communication with any one.

Continuing his findings of fact, the court said:

“Another ground of complaint is as to five members of the jury going to the Airdome. The jurors went there in charge of one of the officers, Mr. Gross. Mr. Twinam, one of the jurors, who was foreman of the jury afterwards, had Mr. Gross to see if they could get a private box, so that they would not come in contact with the rest of the crowd; that the jurors gave the officer the money and he carried them down there after the show began; that they went down Market street and up a street—I believe it was 6th street—to Broad street and up Broad street to the Airdome; that *they did not come in contact with, or have communication with any one, directly or indirectly, going there or coming away; that they took a private box, separate and apart from all others in the house, and went into the house after the show commenced; . . .* There were two performances, one commencing about 7:30 and the other commencing at 9 oclock; that they went in there after the first per-

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formance had begun, and the officer was with them; and that they stayed until after the second performance had begun. The testimony before this court shows that they did not come in contact with anybody, going or coming from this house; that the officers bought the tickets and gave each one his change. The character of the show, as testified to by Mr. Twinam and the other jurors, was a vaudeville show, with songs and some dancing, like they usually have at such a show, but there was nothing reflecting upon the trial of this case or any other murder case. There was no picture or word spoken, or anything of that sort, reflecting upon anything or having anything to do with this character of lawsuit."

It is, of course, an established rule at this time that the findings of fact made by the circuit judge on a motion for a new trial, where there is any evidence to sustain them, are binding upon this court. *Perce v. State*, 118 Tenn. 765, and cases there cited.

As stated before, the evidence is entirely sufficient to warrant every finding which we have quoted from the circuit judge. Bearing in mind the rule that the State may explain a separation and show that the separated jurors had no communication with others, or that such communications were upon subjects foreign to the trial—would we be justified, upon this finding of facts by the circuit judge, in holding this verdict vicious and granting a new trial?

It also appears from the finding of the circuit judge that the portion of the jury which remained at the hotel

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was kept free from outside communication altogether. It thus being established that no effort was made to communicate with these jurors while separated, or if the performance at the vaudeville be termed a communication, that no communication was had with them in any wise reflecting upon the case at issue, and every circumstance and surrounding of the jurors while separated being fully and satisfactorily explained in so far as their contact with others is concerned, it would be a violation of all precedent for us to grant a new trial in this case on this ground.

We do not mean in any way to approve the course of the officers in alleging these jurors to become separated and taking part of them to a theatre. While, as a matter of fact, no communication was had with them, or influence exerted upon them, in this case; and no opportunity seems to have been offered for such communication to have been effected, nevertheless the officers' conduct was reprehensible. They should have been fined by the circuit judge. They took a chance which they should not have done. While the circuit judge has found, and we can see that there was no evil results in this case and the defendant was not at all prejudiced, still it might have resulted differently and it might have been necessary to set this verdict aside, and such a practice as that indulged in here cannot be permitted by a trial court, on the part of its officers or jurors. Both officers and jurors should have been punished by the court.

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However, the separation of this jury is so fully explained and all their movements so completely accounted for, and we can so plainly see that no harm resulted to the plaintiff in error thereby, we will grant no new trial in this case.

Another criticism of the jury is made with reference to the use of intoxicating liquors by them. It appears that some of the members procured some beer, or near-beer, with which they indulged themselves. The evidence tends to show, and the circuit judge finds as a fact, that these liquors were not used to excess, however; and, under our cases, it is settled that a moderate use of liquor under such circumstances, where no juror became affected thereby, will not vitiate the verdict and is no ground for a new trial. *King v. State*, 91 Tenn., 617; *Stephens v. State*, 4 Humph., 26; *Roe v. State*, 11 Humph., 491.

Other criticisms of the conduct of the jury are trivial and are entirely eliminated from our consideration by the evidence heard on the motion for a new trial and the findings of the circuit judge.

Reviewing the whole case, it is idle to say that the evidence preponderates against the verdict of the jury. On the contrary, as we view the evidence, it would have sustained a verdict of murder in the first degree. The plaintiff in error had a full hearing and he was represented by some of the ablest counsel in the State, to whose ability and zeal in behalf of their client, we must ascribe the leniency of the jury. We are convinced that

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none of the matters complained of worked to the prejudice of the defendant on the trial below and are without apprehension that he has received severer punishment than he deserved.

The judgment of the trial court will be affirmed.

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S. R. SPENCER and J. V. THOMAS v. STATE.

(*Knoxville*. September Term, 1911.)

1. **CRIMINAL LAW.** Trial judge's suspension of judgment of conviction and sentence as a reformatory measure is void, and the judgment may be enforced at a succeeding term.

The execution of a judgment of conviction fining the defendant and sentencing him to imprisonment may be suspended by the trial judge by proper reservation made at the trial term, but only for purposes connected with the termination of the cause, and the order should state the cause or reason for the delay, so it may appear whether it be such as the law will recognize, and should specify the length of time for which it is to continue; and where it is apparent from the record that the stay of execution was granted by the trial judge solely as a disciplinary or reformatory measure, to secure future good behavior on the part of the prisoner, such stay of execution is merely void; and this being true, the trial court had the right and power, at a succeeding term, to order *capias* to issue to take the defendant into custody, to the end that he might serve his sentence.

Cases cited and approved: Allen v. State, M. & Y., 294, 298, 299; Fults v. State, 2 Sneed, 236; Whitney v. State, 6 Lea, 247; Allen v. State, 9 Lea, 651; Crane v. State, 94 Tenn., 98; State v. Dalton, 109 Tenn., 544; McCampbell v. State, 116 Tenn., 98, 109; Neal v. State (Ga.), 42 L. R. A., 190; Collins, Ex parte (Cal. App.), 97 Pac., 188; Vance, Ex parte (Cal.), 13 L. R. A., 574; Webb, In re (Wis.), 27 L. R. A., 356; Tanner v. Wiggins, 54 Fla., 203; Barker, In re (Neb.), 113 N. W., 197; Williams, Re (Ala.), 10 L. R. A. (N. S.), 1129; State v. Langham (Minn.), 127 N. W., 425; People v. Allen, 155 Ill., 61; People v. Barrett, 202 Ill., 287; People v. Brown, 54 Mich., 15, 27, 28; Neal v. State, 104 Ga., 509; State v. Abbott (S. C.), 70 S. E., 6; Peterson, Ex parte (Idaho), 113 Pac., 729; State v. Voss (Iowa), 8 L. R. A., 767.

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2. **SAME.** Judgment omitted to be entered upon verdict at trial term may be entered at a subsequent term; common law practice of suspension never existed here.

While it is settled in this State that where by oversight judgment has not been entered in a criminal case upon the verdict at the trial term, it may and should be entered at a subsequent term, yet the common law practice of an indefinite suspension of judgment has never been recognized here, because the reason assigned for such practice does not exist here, where a new trial may be granted by the trial court, and upon its refusal, a full review of the facts and law may be had by appeal to the supreme court. (*Post*, pp. 67-70.)

Cases cited and approved: *Nolin v. State*, 6 Cold., 14; *State v. Miller*, 6 Bax., 514; *Greenfield v. State*, 7 Bax., 18; *Sharp v. State*, 117 Tenn., 537.

3. **SAME.** Governor's power to grant conditional pardons covers indefinite suspensions of sentence by trial court at common law.

The power, conferred by statute (Shannon's Code, section 7236) upon the governor, to grant pardons upon such conditions and with such restrictions and limitations as he may deem proper, not only covers the case of youths and the wrongly convicted in which the trial court could, at common law, indefinitely suspend sentence, but it covers the whole field of usefulness embraced by the common law rule as far as it applies to indefinite suspensions of sentence. (*Post*, pp. 70, 71.)

Code cited and construed: Sec. 7236 (S.); sec. 6102 (M. & V.); sec. 5261 (T. & S. and 1858).

FROM HAMILTON.

Appeal in error from the Criminal Court of Hamilton County.—S. D. McREYNOLDS, Judge.

Spencer v. State.

LEWIS SHEPHERD and W. H. CUMMINGS, for Spencer and Thomas.

ATTORNEY-GENERAL CATES, for State.

MR. JUSTICE NEIL delivered the opinion of the Court.

In this case, in the trial court, judgement on a plea of guilty was entered against plaintiffs in error at the January Term, 1911, for fine and costs and imprisonment in the workhouse for thirty days for selling intoxicating liquors within four miles of an institution of learning, in violation of the statute upon that subject, but execution of the judgment or sentence was suspended during that term, and until and during the first day of the succeeding May term "unless the court shall, during the present term, or on the first day of the next term, otherwise order; and the court, by the consent of the defendant in person in open court, reserves the right to enforce said jail" (workhouse) "sentence, and to issue a *capias*, or other proper process, and to make all necessary and proper orders at any time during the present term, or on the first day of the next term of the court, for the enforcement or further suspension of such jail sentence."

On the first day of the next term an order was entered directing that the sentence of imprisonment be "suspended from day to day during this term of the court, unless otherwise ordered by the court, and

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without further orders are made by the court during this term the sentence will stand suspended until the first day of the next term." During that (May) term, however, it was brought to the attention of the trial judge that plaintiffs in error had again violated the law in the same manner complained of in the indictment under which the judgment of fine and imprisonment had been pronounced. Upon investigation of this matter, by the testimony of witnesses in open court, he found the charge sustained, and thereupon, on motion of the district attorney-general, caused to be entered an order "that said workhouse sentence herein be revived, and the clerk of the court shall issue a workhouse *capias* for said defendants, and they shall be placed in the custody of the workhouse authorities to carry out the sentence of the court." From this latter order the plaintiffs in error prayed an appeal to this court.

The contention on the part of the plaintiffs in error is that the term of the court having ended at which the original judgment was entered, it was beyond the power of the trial judge at a succeeding term to make the last order. The contention of the State is that the suspension of the execution of the order at the January term was beyond the powers of the trial judge, and merely void, and hence he should have caused a *capias* to issue to the end that the execution of the sentence might proceed, just as if the prisoners had escaped from custody after sentence.

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There was undoubtedly a practice at common law of suspending the entry of judgment in criminal cases, after a verdict, on a plea of guilty, during the pleasure of the court, with the consent of the defendant, and subject to the power of the court to cause to be entered a judgment on the verdict or plea at any subsequent term whenever the judge deemed the interests of justice required it. The origin of the practice is thus stated by Lord Hale: "Sometimes the judge reprieves before judgment, when he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy; also when favorable or extenuating circumstances appear; and when youths are convicted of their first offense. And thus arbitrary reprieves may be granted or taken off by justices of gaol delivery, although their sessions be adjourned or finished; and this by reason of common usage." Hale P. C., ch. 58, p. 412. The rule had its origin at a time when the English courts of criminal law had no power to grant new trials, and their judgments were not subject to review on the facts by any higher court. It was therefore humane, and, in the sense, necessary. It cannot be necessary, however, in any jurisdiction where the same disabilities do not exist. Nevertheless, it has been adopted and is now enforced in many of the States of our union, as may be seen from the cases cited in the note to *Ex parte St. Hilare*, (101 Maine, 522) as reported in 8 Am. & Eng. Anno. Cas., 385, and the notes to 12 Cyc., pp. 772-774, also the authorities cited in *People v. Court of Sessions*,

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141 N. Y., 208, 23 L. R. A., 856, which case contains quite a full discussion of the subject: see also *State v. Crooke*, 115 N. C., 760, 29 L. R. A., 260. It is recognized in Illinois, but the power of indefinite suspension is there denied: *People v. Barrett*, 202 Ill., 287, 63 L. R. A., 82; *People v. Allen*, 155 Ill., 61, 41 L. R. A., 473. It is repudiated in Michigan, *People v. Brown*, 54 Mich. 15, 27-28; in Georgia, *Neal v. State*, 104 Ga., 509, 42 L. R. A., 190; in South Carolina, *State v. Abbott*, 70 S. E., 6; and in Idaho, *Ex parte Peterson*, 113 Pac., 729; that is, the power to suspend sentence during good behavior. Everywhere, it is conceded the court has power to suspend judgment for a limited time so as to enable the prisoner to move for a new trial or in arrest of judgment, or to enable the judge to better satisfy his own mind as to what the punishment should be, and on other similar grounds looking to a better enforcement, or to the safeguarding, of the rights involved in the particular controversy. In several States, however, the suspension is for an indefinite time, and is used as a disciplinary measure, keeping the prisoner subject to the control of the court by future orders, and, theoretically, under its observation, to secure future good behavior. Of course, under this practice the judgment of conviction may never be entered, and the prisoner may go scot-free. It has been objected that this indirectly results in the court's granting a pardon, thus exercising powers that belong only to the chief executive of the State. To this it has been replied, with technical correctness, that a conviction involves

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not only a verdict but also a sentence passed by the court, and until conviction the chief executive has no power to pardon. *People v. Fabian*, 192 N. Y., 443, 15 Am. & Eng. Ann. Cas., 100, and note; *People v. Court of Sessions*, supra. Nevertheless, the result effected is really the same. The substance of a power reposed in the chief executive is, by a technical device, appropriated by the courts. We do not doubt that much good is promoted by the practice, in individual instances, but it is open to much abuse, especially in large centres of population. In course of a very brief time it may place hundreds of men, engaged in an illegal business, in a city or county, under the personal power of a single man, the judge of the criminal court, their liberty being subject to his uncontrolled discretion. This, in our judgment is nothing short of despotism.

While in Tennessee we have held that when by oversight judgment has not been entered in a criminal case upon the verdict at the trial term it may be and should be at a subsequent term (*Nolin v. State*, 6 Cold., 14; *State v. Miller*, 6 Bax., 514; *Greenfield v. State*, 7 Bax., 18; *Sharp v. State*, 117 Tenn., 537), we have never recognized the common law practice of an indefinite suspension of judgment—and rightly. The reasons assigned for the practice by Lord Hale do not exist here. Provisions are made by our statutes not only for the granting of a new trial by the trial court, but also for a full review of the facts and the law on appeal to this court. So far as concerns the last reason assigned

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for the rule, the duty of leniency to youths for their first offense, this is fully covered by our statute which provides that: "The governor may grant pardons upon such conditions and with such restrictions and limitations as he may deem proper, and may issue his warrant to all proper officers to carry into effect such conditional pardon." Shannon's Code, sec. 7236. This statute not only covers the case of youths but the whole field of usefulness embraced by the common law rule as far as it applies to indefinite suspensions of sentence. It is true the power so devolved on the governor is very great, so indeed is the power to pardon, in every aspect, but it is placed there by the constitution; moreover he is under the constant observation of all of the people of the State, his term is brief, and any abuse of his powers can be quickly discovered, and punished by the withdrawal of confidence and support.

But the case we are dealing with is not one wherein the trial judge suspended the sentence or judgment, but one wherein, after the entry of the judgment he suspended the execution.

Even in those cases wherein the right to suspend the imposition of sentence is conceded a much stricter rule is administered where an effort is made by the trial judge to suspend the execution of a sentence already imposed. In *State of Iowa v. Voss*, 8 L. R. A., 767, it is said:

"The question in the case is a simple one and demands but brief discussion. The condition of the judgment puts its execution wholly within the discretion of the

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court below, and whether that discretion be exercised with or without justice or reason. If it be the pleasure of that court, process may never be issued upon the judgment. The case is this: We find a judgment for a fine against defendant, which can only be enforced at the pleasure of the court. The judgment is thus suspended, and the State is defeated of the remedy provided by law upon the exercise of the pleasure of the district court. If the power to do this exists in a case of contempt, it must exist in all cases punishable by fine and imprisonment. The law is no respecter of persons. One violator of law possesses no rights or immunities not held by another. It follows then, that all fines and penalties prescribed by law may be collected only when it accords with the pleasure of the court in which judgment is rendered therefor. The claim of the validity of the condition of the judgment leads to the most absurd results. It is hardly necessary to say that it is based upon no statute.

. . . The court, in a proper case, may arrest judgment to attain to the ends of justice, but not to defeat the remedy sought by plaintiff, which is the effect of the order suspending the execution. If judgment be suspended, the action stands for disposition in the future as provided by law. In this case the action is disposed of,—is ended by judgment; and the plaintiff's remedy is indefinitely suspended, or wholly cut off, by the order suspending execution during the pleasure of the judge of the court. The distinction between suspending judgment and suspending execution is

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obvious, and need not be further pointed out. (Citing cases). These are cases wherein sentence after the verdict was suspended,—a different thing from the suspension of execution after judgment on sentence. In our opinion, the order of the district court suspending execution is without the authority of law, and should be declared null and void.”

In *In re Leslie Webb*, 27 L. R. A., 356, the supreme court of Wisconsin said:

“No legal reason appears to have existed to warrant the court in suspending its sentence, in whole or in part, after it had been pronounced, if it be conceded the court had such power. The action of the court seems to have founded on the joint request of the prosecution and of the defendant, and to have been granted as a matter of leniency to the defendant. While it may be said that the defendant is in no position to complain or take advantage of the clemency of the court, the question at issue is one of power, involving serious considerations of public policy respecting the administration of criminal justice. After the defendant had been convicted, and the sentence of the law in legal and proper form had been pronounced against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of the court, for cause, within the exercise of a reasonable discretion, to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of the sentence after it has been pronounced

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cannot be sustained, except as incident to a review of the case upon a writ or error, or upon other well established grounds. After sentence given, the matter within these limits would seem to be wholly within the hands of the executive officers of the law. . . . Here the execution of a sentence already pronounced is indefinitely suspended, and it may be the pleasure of the court never to direct execution, so that the suspension has the practical effect of a pardon, or of arrest of judgment indeterminate or final, without the authority of law; and it has been likened to the incorporation into our criminal jurisprudence of the 'Ticket of Leave System,' without any of its safe-guards, leaving the convicted criminal subject to the mere option or caprice of the judge, who may direct the enforcement of the sentence after any lapse of time, however great, or withhold it to the great detriment, it may be, of the interests of the public,—a power plainly liable to great abuse."

In *Tanner v. Wiggins*, 54 Fla., 203, 14 Am. & Eng. Anno. Cas., 718, it was held that the trial court had no power to suspend the execution of a lawful sentence, except for the purpose of giving effect to an appeal, or where cumulative sentences are imposed, and in some cases of emergency or necessity. In *In re Barker* (Neb., 113 N. W., 197), it was held that on the hearing of an application to determine the sanity of a person convicted of crime, the judge might stay execution of the sentence when absolutely necessary, and that the necessity for such stay must be determined by the

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judge before whom the application is pending in the exercise of a sound legal discretion. To same effect is *Re John Williams* (Ala.), 10 L. R. A. (N. S.), 1129, and note. In *State v. Langham* (Minn.), 127 N. W., 425, it was held that there was a marked distinction between an order staying proceedings after sentence to enable the accused to perfect an appeal, and an order suspending sentence for no definite purpose other than to vest in the court subsequent disciplinary supervision over the conduct of the accused for an indefinite period; that trial courts, independent of statute have power to grant a stay of proceedings for a definite period after conviction, to enable the accused to perfect an appeal, or to take such other proceedings as may be deemed necessary in the protection of his rights.

The cases just referred to, indicate the general nature of the grounds on which an execution of the sentence may be postponed. The principle is that the postponement cannot be made except on some ground conducive to the more perfect execution of the final process or to the safeguarding and security of the prisoner's rights in respect of the particular litigation out of which has grown the judgment or sentence on which the execution is awarded. It cannot be stayed merely for the purpose of enabling the trial judge to hold the sentence *in terrorem* over the head of the prisoner to secure future good behavior.

We have several criminal cases in the State dealing with the subject.

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In *Daniel Allen v. State*, M. & Y., 294, 298-299, a conviction for manslaughter, a motion was made in this court to suspend the execution of the judgment until the next term to enable the prisoner to apply to the governor for a pardon. The suspension was granted "until the further order of this court," and the prisoner was admitted to bail. In disposing of the matter the court said: "No reason has been shown or even offered why in this case bail should not be taken for the forthcoming of the party, at the time that may be directed by the court; and in common cases, where the party can give bail, reasonably to secure his appearance that he may be forthcoming, and subject to the sentence of the law, is all that the law requires. If bail cannot be given, or, what is the same thing, sufficient bail, then it would be the duty of the court to direct him to be kept in jail for safe custody during the time allowed for the procuring of his pardon."

In *Fults v. State*, 2 Sneed, 236, it appeared that the following order was entered in the trial court: "On motion of defendant David Fults, and for reasons appearing to the satisfaction of the court from the admission of the attorney-general and the evidence in the case, he is permitted to enter into recognizance to appear at the next term of this court and then undergo the imprisonment adjudged against him, and abide by and perform the sentence of the court". The defendant gave bail, and duly appeared at the next term of the court. It was thereupon ordered

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that he be imprisoned in accordance with the judgment at the former term, and the defendant then appealed from this order. This court held that the order was properly made, saying: "We see nothing irregular in this proceeding, to which the defendant can except. There are many cases, no doubt, where it is necessary and proper to suspend the execution of the final judgment. For instance, where the prisoner has become *non compos* between the judgment and the award of execution; or, in order to give room to apply to the executive for a reprieve or pardon; or, in *special* cases where the necessity and propriety of such course are rendered evident to the mind of the court". The court added: "Now it is true that the order does not state for what cause the respite was granted. It were better no doubt that the cause be stated, that it may appear to be such as the law will recognize." See also *Whitney v. State*, 6 Lea, 247, approving these two cases. In *James Allen v. State*, 9 Lea, 651, it appeared the execution of the judgment had been postponed or suspended by the trial judge to enable the State to bring the prisoner to trial on another indictment, at the succeeding term, which case the prisoner had continued at the term in which the verdict was pronounced in the first case. The propriety of this practice was recognized by this court. The practice of suspending execution of the judgment in proper cases was recognized in *Crane v. State*, 94 Tenn., 98, although the motion was denied in that case on special grounds stated. It

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appears from the two last paragraphs in the opinion in *McCampbell v. State*, 116 Tenn., 98 and 109, that the trial judge entered an order suspending the execution of the judgment of imprisonment, and on this ground the State filed the record for error, and asked for a correction. In disposing of this matter the court said, speaking through Beard, C. J.: "The trial court was without discretion as to the infliction of this punishment upon conviction. It follows therefore that the order suspending this judgment was erroneous, and will be corrected by a proper judgment entered in this court."

In *State v. Dalton*, 109 Tenn., 544, it appeared that, at the term of the circuit court of Wilson county, Dalton was sentenced to confinement in the workhouse of the county for eleven months, and that at the succeeding term an order was entered "remitting the remainder of the imprisonment during the good behavior of the defendant." This order was held void by this court for the reason, among other things, that it was an invasion of the pardoning power belonging alone to the governor of the State. The case last cited, and *McCampbell v. State*, supra, and the principles stated herein, are conclusive of the present controversy. The case of *Daniel Allen v. State*, *Fults v. State*, *Whitney v. State*, *James Allen v. State*, and *Crane v. State*, recognize the right of the trial judge indeed to suspend the execution by proper reservation made at the trial term, but only for purposes connected with the termination of the cause,

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and *Fults v. State* strongly intimates, which we hold the only correct and true practice, that the order should state the cause or reason for the delay, and, we add, should specify the length of time for which it is to continue.

In the present case it is apparent from the record that the trial judge granted the stay of execution solely as a reformatory measure, to secure future good behavior on the part of the prisoner. His motives, it is apparent, were of the highest character, based wholly upon a desire to subserve the public welfare. However, he exceeded his powers. We therefore hold that the stay of execution was merely void. This being true he had the right to cause a *capias* to issue to take the plaintiffs in error into custody, to the end that they might serve their sentence. *Neal v. State* (Ga.), 42 L. R. A., 190; *Ex parte Collins* (Cal. App.), 97 Pac., 188; and see *Ex parte Vance* (Cal.), 13 L. R. A., 574, and note.

It results that the plaintiffs in error's appeal must be dismissed and the cause remanded to the trial court for execution of the sentence.

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CARL STILL v. STATE.

(*Knoxville*. September Term, 1911.)

1. **DYING DECLARATIONS.** Defined; tending to implicate the accused are admissible; rule and its limitations are well established.

It is unquestionably a well established rule that declarations made by one who subsequently dies from an unlawful act, while *in extremis*, and under the full consciousness of his condition and belief of his impending death, commonly called dying declarations, tending to implicate the accused, are competent upon his trial for the commission of the homicide resulting from the unlawful act; but this rule has its limitations which are equally well settled. (*Post*, pp. 85, 86).

2. **SAME.** Same. Foregoing rule is an exception to the general rule excluding hearsay evidence and requiring the State's witnesses to testify in the presence of the accused.

The rule admitting dying declarations as testimony in such cases is an exception to or a qualification of the general rule excluding hearsay testimony, and requiring witnesses to testify under the sanction of an oath or affirmation, and the constitutional right of the accused in a criminal trial to meet witnesses against him face to face. (*Post*, p. 85.)

3. **SAME.** Same. Same. Reason for the exception to or qualification of the general rule.

The reason for this exception or qualification is placed by some upon the ground that the solemn and awful condition of the declarant approaching certain dissolution is equivalent to the sanction of an oath and equally powerful in impelling him to speak the truth, and by others upon the ground of public policy and necessity to prevent the guilty from escaping punishment by their own wrong in destroying the most important witness against them. (*Post*, p. 86)

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4. **SAME.** To prove *res gestae* of homicide, but not past occurrences and motives.

Dying declarations are incompetent and inadmissible to prove anything further than the *res gestae* of the homicide, that is, the immediate circumstances of the killing and the identity of the perpetrator of the crime, and are inadmissible to prove past occurrences, previous threats, and motives for the commission of the crime. (*Post*, pp. 84-96.)

Cases cited and approved: *Nelson v. State*, 7 Humph., 543; *Poote v. State*, 9 Bax., 270; *Leiber v. Commonwealth*, 9 Bush. (Ky.), 11; *Reynolds v. State*, 68 Ala., 502; *Sullivan v. State*, 102 Ala., 135; *Lipscomb v. State*, 75 Miss., 559; *State v. Shelton*, 47 N. C., 360; *State v. Perigo*, 80 Iowa, 37; *State v. Moody*, 18 Wash., 165; *People v. Fong Ah Sing*, 64 Cal., 253; *People v. Smith*, 172 N. Y., 210.

5. **SAME.** Same. Admission to prove previous threats, past occurrences, and motives, when prejudicial, and properly and seasonably objected to, constitute reversible error when.

The admission of testimony of dying declarations tending to prove previous threats, past occurrences, and motives for the crime, when admitted over the defendant's proper and seasonable objections, and when prejudicial to him, constitute reversible error. (*Post*, pp. 85, 93-96.)

6. **CRIMINAL LAW.** Trial by jury cannot, under the constitution, be denied by supreme court's review of the facts after excluding incompetent and prejudicial evidence.

The constitutional guaranty of a trial by jury means a trial upon competent legal testimony; and if the supreme court should pass finally upon the facts of the case, after excluding the incompetent and prejudicial testimony admitted, and determine that they warranted the verdict and judgment of sentence, it would be a denial of a jury trial under the constitution. (*Post*, pp. 96, 97.)

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FROM KNOX.

Appeal in error from the Criminal Court of Knox County.—T. A. R. NELSON, Judge.

WILLIAM BAXTER LEE, JAMES MAYNARD, JR., JEROME TEMPLETON, and S. G. HEISKELL, for Still.

ATTORNEY-GENERAL CATES, R. L. CATES, and R. A. BROWN, for State.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

Carl Still, plaintiff in error, was convicted of the crime of murder in the first degree, charged to have been committed upon the body of Gilbert May, and sentenced to death. He has prosecuted an appeal in the nature of a writ of error to this court, and assigned errors.

Gilbert May, while entering the gate of the yard of the residence of an acquaintance, in a suburb of the city of Knoxville, a short while after dark on the evening of May 3rd, 1910, in company with a young lady, Miss Miles, whom he was escorting to a Bible class meeting at that place, was assassinated, the assassin shooting him in the back and escaping in the darkness. He lived until the evening of the next day,

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when after making a dying declaration, charging the plaintiff in error, Carl Still, with the assassination, he died.

There is no doubt upon the record that Gilbert May was assassinated as stated, and that his assailant, whoever he may be, is guilty of murder in the first degree. The question presented in this record is the identity of the assassin. The testimony introduced by the State to convict the plaintiff in error of the crime, with the exception of the dying declaration of the deceased, is almost altogether circumstantial. The dying declaration is attacked by testimony tending to prove other statements made by the deceased after he was shot at variance with those proven by the State. There is also testimony offered by the plaintiff in error to disprove the incriminating circumstances against him relied upon by the prosecution.

The chief defense, however, of the plaintiff in error, is an *alibi* to sustain which he testified in his own behalf and introduced three witnesses to corroborate him, that he was at the time of the shooting, which is practically conceded to have occurred thirty-two minutes after seven o'clock on that evening, at the residence of one Samuel Milwee, some distance from the scene of the homicide, and that he remained in the presence of those three witnesses until he was arrested some hours afterwards. The night of the assassination was rather dark; no one was present when the shots were fired, except Gilbert May, Miss Miles and the assassin, and Miss Miles says that she did not see

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the assassin. There is evidence in the record tending to show that Gilbert May and Carl Still were both paying court to Miss Miles, and the former expected to marry her, but Miss Miles and the plaintiff in error say that they were only friends.

These facts are here stated to show that the case was hotly contested before the trial court, and that it was one that required the most careful action of the trial judge in the admission and rejection of the testimony and of consideration of the facts by the jury. They are also necessary to show the bearing of certain portions of the dying declaration of the decedent admitted in evidence over the objection of the defendant and assigned as error.

Dr. Walter S. Nash was introduced as a witness for the State and the dying declaration of the deceased charging Carl Still with shooting him and details of the circumstances of the shooting were by him proven. This declaration, it was conceded, was competent and properly admitted so far as it tended to prove the circumstances of the assassination of the deceased, when and where it was done and the identity of the assassin.

The witness was, however, over the objection of the plaintiff in error, seasonably made, allowed to testify, after detailing the declaration of the decedent concerning the circumstances of the shooting, and accusing the plaintiff in error, and further that decedent said that he intended marrying Miss Miles, to a statement then made by the decedent as follows: That

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witness propounded to the decedent the question: "Had Carl Still ever threatened you?" and that declarant answered: "No, but he said: 'If I can't come to see her, you shall not.' "

The objection made at the time to this statement of the declarant, was that it related to a past occurrence and tended to prove a motive for the commission of the crime, as well as a threat to commit it, when, as insisted by plaintiff in error, a dying declaration is not competent to prove anything further than the *res gestae* of the homicide, that is, the circumstances of the killing and the identity of the perpetrator of the crime.

The action of the court in admitting this testimony is assigned as error.

Declarations made by one who subsequently dies from an unlawful act, while *in extremis*, and under the full consciousness of his condition and belief of his impending death, commonly called dying declarations, tending to implicate the accused, are competent upon his trial for the commission of the homicide resulting from the unlawful act. The rule admitting this character of testimony in such cases is an exception to or a qualification of the general rule excluding hearsay testimony, and requiring witnesses to testify under the sanction of an oath or affirmation, and the constitutional right of the defendant in a criminal trial to meet the witnesses against him face to face.

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Courts, in the adjudged cases, and the text-books upon the subject, differ some in the reasons justifying this exception or qualification, some placing it upon the ground that the solemn and awful condition of the declarant approaching certain dissolution, is equivalent to the sanction of an oath and equally powerful in impelling him to speak the truth. While others put it upon the ground of public policy and necessity, because otherwise, in many cases where no one was present, or there was serious conflict in the testimony of those who were present, the guilty might escape punishment largely by destroying the most important witness to the commission of the crime.

The rule, however, is well established and cannot now be questioned. But it has its limitations which are equally well settled.

Among other limitations, it is well settled that the declaration admissible is confined to the immediate circumstances of the homicide and the identity of the party committing it. Previous threats made by the accused against the declarant and facts tending to prove a motive for the crime, occurring before the homicide, cannot be proven in this way. This was early settled in this State. In the case of *Nelson v. The State*, decided in 1847, and found reported in 7 Humph., 543, Judge Reese, speaking for the court, in reversing a conviction of the plaintiff in error for murder for the admission of an incompetent dying declaration, after holding that the declaration was inadmissible because not made *in extremis*, said:

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“It may well be doubted, if this had been otherwise, whether the subject-matter of the declaration, namely, that the prisoner ‘had two or three times before tried to kill him’, would have been competent testimony. Declarations are admitted, from the necessity of the case, to identify the prisoner and establish the circumstances of the *res gestae* or direct transactions from which the death results. When they relate to former and distinct transactions, they do not seem to come within this principle of necessity.”

This enunciation of the rule is in accord with the great weight of authority, judicial and text-book, and has been continually recognized and followed as the law in this State.

In Phillips on Evidence, Vol. 1, 232, it is said:

“Dying declarations have been limited even in criminal cases and the rule is now that such declarations are generally admissible only where the death of the declarant is the subject of the inquiry, and where the circumstances of his death are the subject of his dying declaration.”

This is quoted with approval by Freeman, Judge, in the case of *Poteete v. The State*, 9 Bax., 270.

Mr. Bishop, in his work on Criminal Procedure, Vol. 1, section 1207, states the rule to be:

“The limits are, that the declaration must proceed from the very person alleged to have been killed, one from any third person not being admissible; it must relate to the circumstances of the killing and by whom; it cannot also include what went before, or a separate

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and disconnected fact, or an opinion, or the state of feeling existing between the declarant and the defendant. To no greater extent, and in no other causes, civil or criminal, is it receivable.”

In Underhill on Criminal Evidence, section 109, it is said:

“Must refer to the *res gestae* of the homicide. The declaration is admissible only so far as it points directly to the facts constituting the *res gestae* of the homicide; that is to say, to the act of the killing and to the circumstances immediately attendant thereon. A dying declaration showing why the deceased went to the place where the homicide was committed, or that, after the crime, he stated to a bystander that he was unarmed, or stating actions of the accused or of the deceased prior to the circumstances, directly involved in the homicide as the possible motive for it, is not admissible. Thus, a statement that enmity always existed between the prisoner and the declarant, or that they had always been friends, or, describing previous altercations between them, or detailing threats made by the accused, against the deceased long prior to the crime, has been rejected.”

And in the great work of Mr. Elliott on Evidence, Vol. 1, sec. 336, we find this in regard to the limitations of the rule:

“The declarations must relate to the cause of the death, or to some circumstance of the transaction which resulted in the death. Declarations of distinct or separate prior or subsequent occurrences, as, for in-

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stance, of antecedent threats, are not competent evidence. These and other such declarations are not competent because they relate to distinct and separate transactions. So dying declarations are, as a rule, not admitted to prove what occurred before the act which caused the declarant's death. And so dying declarations to prove what occurred after that transaction are, as a rule, excluded. It has been held that declarations made by the declarant after he was shot, calling the attention of witnesses to the fact that he was unarmed, should not be admitted. And it has been held that dying declarations showing the feelings between the declarant himself and the accused are not competent evidence for the prosecution. So, when it is necessary for the expression and language to be aided by conjecture or supposition to establish the facts necessary to be proved to criminate the accused, such indefinite statements are not competent, for they must clearly refer to the cause of death or to some circumstance of the transaction which resulted in the death."

The limitation of such evidence to the *res gestae* or immediate facts of the homicide and the identity of the accused, are stated in equally as strong language by the courts of last resort of other States. We make some quotations from the opinions of those courts.

"The admission of dying declarations as evidence, being in derogation of the general rule which subjects the testimony of witnesses as ordinarily received to

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the two important tests of truth, an oath and a cross-examination, it is obvious that such evidence should be admitted only upon the grounds of necessity and public policy, and should be restricted to the act of killing and the circumstances immediately attending it, and forming a part of the *res gestae*." *Leiber v. Commonwealth*, 9 Bush. (Ky.), 11.

"Dying declarations are admitted to identify the prisoner and the deceased, to establish the circumstances of the *res gestae*, and to show the transaction from which the death results. . . . The dying declaration of a deceased person, showing the state of feelings between himself and defendant charged with his homicide, are not competent evidence for the prosecution." *Reynolds v. The State*, 68 Ala., 502.

"That dying declarations are restricted to the act of killing, and the circumstances immediately attending it and forming a part of the *res gestae*." *Lipscomb v. State*, 75 Miss., 559.

"Nothing previously done or said unless called up and made a part of the altercation can be proven as a dying declaration." *Sullivan v. State*, 102 Ala., 135.

In the case of the *State v. Shelton*, 47 N. C., 360, the court said, on page 364, as follows:

"As in many cases the knowledge of the facts attending the killing is confined to the party killed and the perpetrator of the crime, there is public necessity for admitting dying declarations as evidence, 'in order to preserve life by bringing manslaughterers to justice', but as the exception can only be sustained on the

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ground of necessity, it is restricted to cases of indictment for homicide and it is further restricted to the act of killing and the circumstances immediately attending the act and forming a part of the *res gestae*. If it can be extended to a separate and distinct act occurring half an hour before, it will extend to any act done the day before, or a week, month, or even a year. As soon as the limit fixed by absolute necessity is passed the principle upon which the exception is based being exceeded, there is no longer any limit whatever, and dying declarations become admissible, not merely to prove the act of killing but to make every homicide murder by proof of some old grudge.

“That the exception is restricted in the manner above stated is clear for the reason of the thing and is settled by authority.”

For error in the admission of a previous threat this case was reversed.

In the case of the *State v. Perigo*, 80 Iowa, 37, it was held that declarations made by the deceased in regard to threats made against him by the defendant before the homicide were improperly admitted.

The Court said:

“These threats were not the statement of anything forming a part of the *res gestae*, but of a foreign and distinct transaction. The rule that dying declarations should point distinctly to the cause of the death, and to the circumstances preceding and attending it, is one that should not be relaxed.”

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“We are clearly of the opinion that this testimony was improperly admitted. While it is true there was no question but that the defendant inflicted the mortal wound, and the statements testified to contain nothing as to the facts or circumstances of the homicide, and were, therefore, immaterial, yet we cannot say that the defendant was not prejudiced thereby. While the jury may have regarded the statement of deceased as to the hardship of his situation, as immaterial, we cannot say the same as to the statements that threats had been made against him.”

In the case of the *State v. Moody*, 18 Wash., 165, it was held that the statement in the dying declaration, that the accused had made previous threats against deceased, were inadmissible evidence because they were no part of the *res gestae*. In this case, the part objected to was as follows: “Had he ever threatened before to injure you?” And the answer: “Yes.” The court said:

“We think it may be conceded without citation of authority, that prior threats are no part of the dying declaration, that they are no part of the *res gestae*, and therefore, cannot be admitted as a dying declaration of the deceased. The universal rule is that dying declarations are restricted to the act of the killing and the circumstances preceding it and forming a part of the *res gestae*.”

In the case of the *People v. Fong Ah Sing*, 64 Cal., 253, the dying declaration admitted contained the statement of a former difficulty, which occurred a few

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days previous to the shooting, between the declarant and defendant.

The court in reversing the case said:

"Dying declarations are restricted to the act of the killing and to the circumstances immediately attending it and forming a part of the *res gestae*. When they relate to former and distinct transactions, they do not come within the principle of necessity on which such declarations are received."

In the case of *People v. Smith*, 172 N. Y., 210, the defendant was convicted of murder in the first degree. The court reversing the case for the admission of an incompetent dying declaration, said:

"The more serious question, however, is whether the declarations of the decedent were properly admitted as to what transpired before the time of the homicide. The record plainly discloses that the proof of the dying declarations of the decedent in which it was stated that she said, 'I guess I got up first; I heard him strike a match; it was about twelve o'clock, and I got into bed first', all related not to the transaction which took place at the time of the tragedy or to the homicide, but to a disconnected transaction which occurred about three hours before the fatal injuries were received by her. As to her statements in this respect, there is some variance in the proof. But without considering any discrepancies in the evidence, it is obvious that the greater portion of the dying declaration of which proof was admitted referred, not to the homicide, but to an occurrence which took

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place hours before. Manifestly, that occurrence formed no part of the *res gestae*, but was an independent transaction, not shown to have had any connection with the crime, and the declarations of the decedent in relation thereto were a mere narrative of past occurrences and not a part of the act which resulted in death. It seems to be well settled that dying declarations are admissible in cases of homicide, only when the death of the decedent is the subject of the charge, and the circumstances of the death are the subject of the declaration, and that they may not properly include narratives of past occurrences.

“It is, therefore, manifest that under the rules of law governing the admission of dying declarations, the trial court erred in admitting proof of the declarations of the decedent as to what occurred previous to the homicide.”

There are many other cases in accord with these, and we have found none in conflict except those decided by the supreme court of Georgia.

The rule admitting dying declarations with, among others the limitation stated, in homicide cases is very ancient and its application for many years has proven it to be a very wholesome one, but we do not think it should be extended. To do so would open the door to possible abuses of a serious nature. As stated by this court in *Poteete v. The State*, supra, “Such testimony is subject to many objections and inherent infirmities. The party is not in condition, frequently, to give calm attention to the question to which he

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makes his statement. It is usually made in the presence of friends whose feelings are excited against the other party against whom they are to be used, and who may easily direct the dying man's attention to the points in the case bearing most heavily on the guilt of the accused, and who will most naturally leave out of the view all that tend to a different view. The accused is not present, and has neither an opportunity to make suggestions to call attention to the circumstances in his favor, nor to cross-examine to show inaccuracies of memory, or express bias from passion or prejudice."

The context shows that the objectionable statement related to a past occurrence between decedent and plaintiff in error in regard to the young lady the former was escorting that night. There is no pretense that it was part of the *res gestae*. It is equally certain that it was very prejudicial to the plaintiff in error. It furnished the only evidence of a motive for the crime in the record,—jealousy—a motive which as the attorney-general stated in his argument at the bar is one of the most frequent found in cases of this character, and the experience of men and the annals of criminal jurisprudence show that the passion aroused by it is of the most cruel and relentless character. There is no evidence of any motive upon the part of any other person appearing in the record to take the life of Gilbert May, and this testimony therefore, challenged the attention of the jury very powerfully.

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The objectionable statement also involves a threat to do the declarant violence, a threat directly applicable to the facts of this homicide. It was to the effect that plaintiff in error would interfere to prevent the defendant from paying attention to Miss Miles, and he was shot and killed while doing this very thing.

There was no other testimony in the record tending to prove a threat of this nature.

It is probable that this incompetent testimony had great weight with the jury in reconciling the many discrepancies and conflicts existing and inconsistencies claimed to exist in the testimony of the witnesses for both the prosecution and the defense, and in leading them to the conclusion that the plaintiff in error was guilty. It is reasonable to say that it did have some weight with the jury in arriving at the verdict. It was incompetent, and the admission of it over the objection of the plaintiff in error was reversible error.

We cannot inquire whether excluding this incompetent testimony, the evidence sustains the verdict of guilty. That is a question for a jury to decide. The constitution guarantees every citizen a trial by a jury of his peers. This means a trial upon competent legal testimony. Such a trial the plaintiff in error has not had. If this court should now pass finally upon the facts of the case excluding the incompetent testimony admitted, it would be a denial of a jury trial. It is only where the court can see that the in-

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competent evidence admitted did not prejudice the defendant in the trial court, that this court will consider and determine the case upon the facts. As stated, we hold that this testimony was prejudicial. Therefore, this assignment of error must be sustained and the judgment reversed and the case remanded to the lower court for a new trial.

There is also an assignment of error that the evidence preponderates against the verdict of guilty and in favor of the innocence of the plaintiff in error. We do not pass upon this assignment. The case must again go before a jury, and we do not decide or intimate anything upon this question. It would be improper for us to do so.

We determine nothing as to the guilt or innocence of the plaintiff in error.

Reversed and remanded for a new trial.

Divine v. Bank.

PAUL E. DIVINE, *Administrator*, v. UNAKA NATIONAL
BANK *et al.*

(*Knoxville*. September Term, 1911.)

1. **STATE'S JURISDICTION.** Remains over land bought or condemned by the United States for its own use; qualification of rule.

Where the United States buys or condemns land within a State for its own use, the jurisdiction of the State wherein the land lies remains the same as before, with the qualification that the State cannot interfere with the full, free, and perfect use for which it was acquired or in any way embarrass that use. (*Post*, pp. 106, 107.)

Cases cited and approved: Railroad v. Lowe, 114 U. S., 525; Ohio v. Thomas, 173 U. S., 276.

2. **SAME.** Same. State's reservation of right to serve process within ceded territory is limited to actions arising without that territory; rights enforced in State courts, when.

Where land within a State is acquired by the United States, with the consent of the State, the jurisdiction of the United States over it is, under the federal constitution (art. 1, sec. 8, par. 17), complete and exclusive, and the State's reservation of the right to serve civil and criminal process within the territory ceded is limited to causes of action arising outside of the ceded territory; but the laws of the State for the protection and enforcement of the municipal or private rights of individuals residing within the ceded territory continue in force, unless the United States provides legislation for such territory, and where jurisdiction is not given by federal laws to federal courts to assert and protect private rights, such rights may be enforced in the State courts. (*Post*, pp. 107, 108.)

Cases cited and approved: Railroad v. Lowe, 114 U. S., 525; Railroad v. McGlinn, 114 U. S., 542; Downes v. Bidwell, 182 U. S., 244, 298.

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- 3. JURISDICTION.** Must be conferred upon federal courts by federal constitution or statutes; no probate jurisdiction.

The federal courts have no jurisdiction, except that conferred by the federal constitution or acts of congress, and they have no probate powers, or authority to appoint an administrator. (*Post*, pp. 108, 109.)

Cases cited and approved: *Turner v. Bank*, 4 Dall., 8; *United States v. Hudson*, 7 Cranch, 32; *United States v. Bevans*, 3 Wheat., 337.

- 4. SAME.** Of State and federal courts is concurrent unless the jurisdiction of the federal courts is made exclusive.

The State courts have concurrent jurisdiction with the federal courts in all cases wherein the jurisdiction of the latter is not made exclusive, either by direct legislation or by necessary implication, or by such incompatibility with the existence of State authority that it could not be supposed the State courts should assume jurisdiction. (*Post*, pp. 108, 109.)

Cases cited and approved: *Clafin v. Houseman*, 93 U. S., 130; *Water Co. v. Defiance*, 191 U. S., 194.

- 5. SAME.** Federal officer in ceded territory may be sued in State courts for acts as a private citizen.

A person holding a federal office within the territory acquired by the United States, with the consent of the State, who assumes to exercise powers not appertaining to his office, or not conferred upon him by law, is so far forth not a federal officer, and not protected by his office, and may be sued in a State court embracing such territory, just as if he were a private citizen, by persons injured through such unlawful acts. (*Post*, p. 109.)

Cases cited and approved: *Slocum v. Mayberry*, 2 Wheat., 1; *Teal v. Felton*, 12 How., 284; *Buck v. Colbath*, 3 Wall., 334; *Scranton v. Wheeler*, 179 U. S., 141, 151.

- 6. SAME.** Probate jurisdiction for appointment of administrators is in State courts, and not in federal courts, even though

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decedent died on territory ceded by State to federal government.

No probate powers, or authority to appoint an administrator, have been conferred upon the federal courts; and, therefore, this power remains with the State courts. So, where an inmate of a national home for disabled soldiers, located on land ceded by the State to the federal government, subject to the State's reservation of the right to serve civil and criminal process within the territory ceded, dies, the State court has probate jurisdiction of his estate, and an administrator appointed by the proper State probate court has authority to compel the officers of such home to deliver to him the personal property and assets of the decedent. (*Post*, pp. 109, 110.)

Code cited and construed: Sec. 3935 (S.); sec. 3043 (M. & V.); sec. 2203 (T. & S. and 158).

Cases cited and approved: *Yonley v. Lavender*, 21 Wall., 276; *Byers v. McAuley*, 149 U. S., 608; *O'Callaghan v. O'Brien*, 199 U. S., 89; *Bedford Quarries Co. v. Thomlinson*, 36 C. C. A., 276.

7. BANKS AND BANKING. Bank cannot be compelled to pay certificate of deposit without its surrender, or indemnity against it, if lost.

A bank cannot be compelled to pay a certificate of deposit issued by it, without a surrender of the certificate, unless its production has become impossible on account of its loss, or for other reason, and then a bond of indemnity must be given. (*Post*, pp. 110, 111.)

8. CHANCERY PLEADING AND PRACTICE. Supreme court may remand cause for amended bill bringing in necessary parties, with right to renew demurrer, when.

Where a bill is demurrable for want of necessary parties, the supreme court may remand the cause, with leave to the complainant to file an amended bill, bringing in said necessary parties, with a view of obtaining a proper decree against them as a prerequisite to relief against the party sued; and in default of the filing of such amended bill within a time to be

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fixed by the chancellor, the defendant will be given leave to renew the demurrer. (*Post*, p. 111.)

FROM WASHINGTON.

Appeal from the Chancery Court of Johnson City to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—HAL. H. HAYNES, Chancellor.

DIVINE & MOORE, for complainant.

S. C. WILLIAMS, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill contains the following allegations:

“That Thomas Brown died intestate in Washington county, Tennessee, on the 12th day of November, 1908, within the limits of the reservation of the Mountain Branch of the National Home for Disabled Volunteer Soldiers, and as a member thereof; that the complainant was duly appointed as his administrator by the county court of Washington county, on November 30, 1909, and qualified and gave bond as such. Letters of administration issued in pursuance thereof, and the original or duly certified copies thereof will be filed on or before the hearing, if required.

“The complainant would further show that his intestate was a soldier of fortune, a wanderer over the

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face of the earth, without family or home. He was born in India, came to America in time to participate as a soldier of the United States in the war between the States from 1861 to 1865, and later drifted southward to some of the Spanish-speaking countries, where he remained for some time. Later said intestate returned to the United States, and after wandering from place to place, without any fixed place of residence, habitation, home, or domicile, and without any purpose or intention on his part so to do, or to permanently establish himself theretofore, he came to the said Mountain Branch of the National Home for Disabled Volunteer Soldiers, in Washington county, Tennessee, and became a member thereof, by reason of his military service as aforesaid, where he died.

“Complainant would further show that his intestate at the time of his death left two small open accounts or deposits in some of the local banks here in Johnson City, Tennessee, which have been paid over to and received by him in virtue of his said appointment as administrator, and that in addition his said intestate had the following estate, rights, and credits at the time of his death, to wit:

“(1) A deposit in the defendant, the Unaka National Bank, here in Johnson City, Tennessee, in the sum of \$312, made by said intestate voluntarily and of his own volition and motion after he became a member of said Mountain Branch, and which said deposit is represented by a certificate issued to said intestate by the defendant therefor, No. 9630.

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“(2) Another deposit made in like manner and under like conditions and circumstances with the defendant for \$25; the certificate representing same being No. 9640.

“Complainant would show that these said certificates of deposit were in the possession of said intestate at the time of his death, the property of said intestate, undorsed, untransferred, and undisposed of in any way, and in no wise hypothecated. Complainant would show that said intestate died within said Mountain Branch reservation limits, and the authorities thereof in the discharge of their duties gathered up the same as bailees, trustees, and agents of and for those rightfully entitled thereto, and your complainant has been unable to secure the same, or obtain the possession thereof, as he verily believes he is entitled to do. Complainant charges that said authorities have no title or ownership, claim, or beneficial interest in said certificates, no property rights in the same, and no right, power, or authority to sell, transfer, convey, indorse, collect, or make any assignment thereof in law, equity, or in fact. And complainant further charges on information and belief that no such attempt has been made.

“Complainant would further show that said authorities also hold another item or asset, gathered up in the same way, the property of said intestate; that is, an original and duplicate check, issued to said intestate by the defendant Unaka Bank, on Lloyd’s Bank, Limited, of London, England, for about one pound and seven pence, which was unassigned, and which was the property of

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the decedent at the time of his death, and which now constitutes an asset of his said estate, due, owing, and collectible from said defendant bank.

“Complainant would further show that as administrator of the estate of the said Thomas Brown, under and by virtue of the appointment and letters of administration aforesaid, he has requested of said authorities of the said Mountain Branch the possession and delivery of said certificates and assets as above mentioned and shown, but that said authorities, for one captious reason or another, among them the asserted contention that said authorities were not in the reach or subject to process of the courts of Tennessee, or were exempt therefrom in this behalf, though without any claim of interest, right, or title or benefit therein, have failed, neglected, and refused to make the delivery demanded, or to turn over the same to your complainant as such administrator on demand. Complainant would further show that as such administrator he has made the said Unaka National Bank acquainted with the said failure on the part of the said home authorities, and said bank has failed and refused to pay over the amount of said certificates on demand without a surrender of said certificates concurrently, which condition your complainant has been unable to comply with for the reasons above shown.

“Your complainant would further show that said amounts hereinbefore set forth and shown are *bona fide* assets of the estate of his intestate, and that he is advised that he has a right to come into your honor's

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court and compel the defendant by proper order and decree to pay over the same, with full interest and the costs of the cause. Said amounts are due, owing, and unpaid, and said defendant bank is responsible and liable therefor to your complainant. Said home authorities in law have no claim of right, title, or beneficial interest in the said certificates and checks, could not lawfully make such claim, and do not so attempt to do. Said home or its authorities are without power to collect, sell, transfer, or assign the same, and there is no law or authority whereby they can be constituted or nominated as administrator as against your complainant, or exercise in the least or in any wise any probate jurisdiction whatever. Complainant further charges that no other jurisdiction or forum than the county court of Washington county, Tennessee, can appoint an administrator, and your complainant can lawfully receive said amounts from the said defendant, or compel it to pay over or turn over the same."

The bank demurred on several grounds, the substance of which is that it was entitled to have the certificates surrendered before payment, and that the bill did not allege that any demand had been made, accompanied by such offer of surrender of the certificates of deposit, and contained no sufficient excuse for such failure.

The chancellor sustained the demurrer and dismissed the bill, and the complainant appealed to the court of civil appeals, and in that court the decree of the chancellor was reversed. Thereupon the cause was brought

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to this court by the writ of *certiorari*, and is here for consideration.

The ground embracing the home was ceded by this State to the United States by an act passed in the year 1901, Acts 1901, c. 98), which contained the following provisions:

“That the consent of the general assembly be, and is hereby, given to the acquisition by the National Home for Disabled Volunteer Soldiers by purchase, condemnation, or donation of lands not exceeding two thousand acres, in Washington county, for the establishment and maintenance of a branch of said home within five miles of Johnson City; that jurisdiction of the lands aforesaid, and their appurtenances, which may be acquired by the managers of the National Home for Disabled Volunteer Soldiers for the uses and purposes of said home, be, and is hereby, ceded to the United States of America: Provided, however, that all civil or criminal process issued under the authority of the State of Tennessee, or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same manner as if jurisdiction had not been ceded, as aforesaid,” etc. *State, ex rel., v. Willet*, 117 Tenn., 341, 342, 97 S. W., 301.

The law is that when the United States merely buy land within a State for their use, or when it is condemned for such purpose, the jurisdiction of the State wherein the land lies remains the same as before, just as if any other owner had acquired the land, with the qualification, of course, that the State cannot interfere

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with the full, free, and perfect use for which it was acquired, or in any way embarrass that use. *Fort Leavenworth, etc., v. Lowe*, 114 U. S., 525, 5 Sup. Ct., 995, 29 L. Ed., 264; *Ohio v. Thomas*, 173 U. S., 276, 19 Sup. Ct., 453, 43 L. Ed., 699.

But where land within a State is acquired by the United States, with the consent of a State, then under article 1, section 8, subsec. 17, of the federal constitution, the jurisdiction of the United States is complete and exclusive, and the reservation contained in such grants, to the effect that the State shall have the right to serve civil and criminal process within the territory ceded, is limited to causes of action arising outside of the ceded territory; the purpose of such reservation being to prevent the territory's becoming an asylum for fugitives from justice. This must be understood and applied, however, in the light of the principle of public law that, when the new sovereign has not provided legislation for the territory so acquired, the laws of the former sovereign continue in force so far as needed for the protection and enforcement of the municipal or private rights of individuals residing within the territory. *Fort Leavenworth R. R. Co. v. Lowe*, supra; *Chicago Rock Island, etc., Co. v. McGlinn*, 114 U. S., 542, 5 Sup. Ct., 1005, 29 L. Ed., 270; *Downes v. Bidwell*, 182 U. S., 244, 298, 21 Sup. Ct., 770, 45 L. Ed., 1088, 1110, 1111. It is said that court jurisdiction is necessarily dependent upon the legislative power of the sovereign under whose authority the court was constituted, and that when the latter ceases the former must fail with it. This is in general

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true, but an exception must be recognized when the new sovereign, out of deference to the principle of public law above referred to, recognizes the continued existence within the particular territory of the laws of the former sovereign. Those laws cannot be made effective, except through the aid of a court. The federal courts have no jurisdiction, except that conferred by the constitution or by an act of the congress. *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed., 259; *Turner v. Bank of N. A.*, 4 Dall., 8, 1 L. Ed., 718; *U. S. v. Berans*, 3 Wheat., 337, 4 L. Ed., 404. And where they have jurisdiction over controversies arising out of the nature of the questions involved, there is a limitation upon that jurisdiction, measured by an amount of value in excess of that involved in the present controversy, except those in which the federal government is itself a party. If jurisdiction is not given by federal law to federal courts to assert and protect the private rights conceded to exist within the newly acquired territory, they must remain outside the pale of law unless they can be asserted in the courts of the States. The federal government and the governments of the several States are not foreign to each other, but together constitute one complete system, the federal government performing its functions within its apportioned limits, and the States performing theirs. The courts of the States have concurrent jurisdiction with the courts of the United States in all cases wherein the jurisdiction of the latter is not made exclusive, either by direct legislation, or by necessary implication, or by such incompatibility with the existence of State au-

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thority as that it could not be supposed the State courts should undertake the matter. *Claflin v. Houseman*, 93 U. S., 130, 23 L. Ed., 833; *Defiance Water Co. v. Defiance*, 191 U. S., 194, 24 Sup. Ct., 63, 48 L. Ed., 144. If the State courts can exercise such jurisdiction in the enforcement of causes of action growing out of federal laws, we can see no reason why they cannot enforce causes of action recognized by federal law as continuing to exist in territory ceded by the States, but which the federal government has provided no means of enforcing through its own courts. If there be any person, holding federal office within such territory, who assumes to exercise powers not appertaining to his office, or not conferred upon him by law, such person is so far forth not a federal officer, and not protected by his office, and may be sued in a State court of the State embracing such territory, just as if he were a private citizen, by persons injured through such unlawful acts. *Teal v. Felton*, 12 How., 284, 13 L. Ed., 990; *Buck v. Colbath*, 3 Wall., 334, 18 L. Ed., 257; *Slocum v. Mayberry*, 2 Wheat., 1, 4 L. Ed., 169; *Scranton v. Wheeler*, 179 U. S., 141, 151, 21 Sup. Ct., 48, 45 L. Ed., 126, 133.

To apply these principles to the facts of the present case: The federal courts have been given no probate powers, by the congress, or authority to appoint an administrator of a decedent. *Yonley v. Lavender*, 21 Wall., 276, 22 L. Ed., 536; *Byers v. McAuley*, 149 U. S., 608, 13 Sup. Ct., 906, 37 L. Ed., 867; *O'Callaghan v. O'Brien*, 199 U. S., 89, 25 Sup. Ct., 727, 50 L. Ed., 101, 111. And see cases collected in note to *Bedford Quarries*

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Co. v. Thomlinson, 36 C. C. A., 276, 277. Therefore this power remains with the State courts; and the county court of Washington county acted in accordance with law when it appointed an administrator of Brown's estate—he having died in Washington county, leaving there the certificates of deposit on the defendant bank also located within the county. Shan. Code, section 3935. As incident to the administration, Maj. Divine became at once entitled to the possession of the evidences of indebtedness above referred to. Under the facts stated in the bill, the officers of the home are without legal justification in detaining these papers from him, and he is entitled to bring his suit against them therefor. No federal court can entertain jurisdiction of the controversy, because, even laying out of view all other reasons, the amount involved is not sufficiently large. The complainant could have replevined the papers referred to in the circuit or chancery court of Washington county prior and preparatory to the present action, or he could have brought before the chancery court in this action both the bank and the persons residing within the home assuming to withhold these papers from him, and there had the question of the right of possession as between the two settled, and at the same time could have caused the money to be paid into court by the defendant bank, or on its refusal to pay could in due course have had judgment against it, on final hearing, with execution to enforce it. In either event the bank would have been protected. The bank is entitled to have the certificates surrendered when it makes payment, or in case they can-

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not be surrendered because of loss, or other impossibility of production, then to have a bond of indemnity given to protect it. In the present case we think no such impossibility exists. We have concluded, therefore, to direct the entry of the following decree:

Let the demurrer be overruled, and the cause remanded to the chancery court of Washington county, with leave to the complainant to file an amended bill, bringing in the persons who have possession of the certificates and check referred to and contesting their right to hold the same. In default of the filing of such amended bill within a time to be fixed by the chancellor, the defendant bank will have leave to renew its demurrer.

The costs of the appeal will be paid by the complainant.

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E. L. EVANS v. R. H. EVANS.

(*Knoxville*. September Term, 1911:)

1. **DIVORCE.** Award of custody of minor child to its mother does not relieve its father from liability for its support.

A father is liable for the support of his minor child, after a divorce has been obtained at the suit of the wife and the custody of the child awarded to her, when no provision was made in the divorce decree for the maintenance of the child. (*Post*, pp. 113-116.)

Cases cited and approved: *Spencer v. Spencer*, 97 Minn., 56; *Alvey v. Hartwig*, 106 Md., 254.

Case cited and distinguished: *Toncray v. Toncray*, 2 Shannon's Cases, 408.

2. **SAME.** Same. Reasons for the foregoing rule.

The reasons for the rule stated in the preceding headnote are that the law of nature and the law of the land impose upon the father the natural duty and primary obligation reasonably to support and maintain his minor children, and this duty and obligation cannot be evaded by his own wrong in giving his wife grounds for divorce and in rendering himself unsuitable as the custodian of his children. The father is not relieved from his obligation to support them, upon the ground that he is deprived of their services, and that services and support are reciprocal, because it is his own wrong and misconduct that works a forfeiture of his rights to their custody and services. (*Post*, pp. 116-119.)

Cases cited and approved: *Pretzinger v. Pretzinger*, 45 Ohio St., 452; *Spencer v. Spencer*, 97 Minn., 56; *Alvey v. Hartwig*, 106 Md., 254.

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3. SAME. Same. Same. Father is only required to support his minor children in a manner commensurate with his means and station in life.

Where the custody of a minor child has been awarded to the mother upon her obtaining a divorce from the father, he is only required to maintain and support the child in a manner commensurate with his means and station in life, and is not liable for an extravagant allowance. (*Post*, pp. 113, 119.)

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—M. M. ALLISON, Circuit Judge.

R. B. COOKE and R. T. WRIGHT, JR., for plaintiff.

C. R. EVANS, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

The plaintiff in error, Mrs. E. L. Evans, obtained a divorce from the defendant in error, R. H. Evans, a number of years ago, in a Kentucky court.

The decree of divorce does not recite the grounds upon which it was obtained, but it appears to have been had at the suit of the wife, and by this decree the custody of a child born to this couple was awarded to the mother.

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After securing the divorce, it seems that the wife went to New York, where she has since resided, and the husband went to Chattanooga, which has since been his home.

The little girl went with her mother to New York, and her father, from time to time, made contributions to her support. She often visited her father in Chattanooga, and spent some time with him there, where her grandmother also resided. The father provided for her while she was in Chattanooga.

In 1910 he sent her to Atlanta to school, at which place it appears that he paid the bulk of her expenses. The girl was then about fifteen or sixteen years of age. Along toward the close of the term, having received no communication from her father as to what his subsequent wishes were, she wrote to her mother for money to come to New York. This was forwarded by her mother, and the girl went to New York during the month of May, 1910, where she has since been with her mother.

In January, 1911, this suit was brought by the mother to recover from the father the sum of \$450, alleged to be the amount required for the support and maintenance of the girl from April 8, 1910, to December 1, 1910.

This suit was dismissed by the circuit judge, and his action was affirmed by the court of civil appeals. . A writ of *certiorari* was granted by this court, and the case is here for review.

The action of the lower courts seems to have been based upon the case of *Toncray v. Toncray*, 2 Shan. Cas., 408. In that case Toncray's children left his home, and

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went to the home of certain relatives of theirs, and upon suit brought for the expenses of the children while at the home of these relatives, this court said that inasmuch as Toncray had a home of his own, where he was willing and able to provide for his children, he could not be held responsible for them, when they left him, refusing the support he offered them, and sought to render him liable for their maintenance elsewhere. This case of *Toncray v. Toncray* is no authority here. Mr. Toncray was entitled to the custody and control of his children. He had a right to keep them at home, to determine where they should stay, and to maintain them at the place of his selection.

In this case, the father, Evans, has no such right. The custody of this child was intrusted to her mother. Evans has no voice as to where she shall reside; but, by decree of court, the mother is made the arbiter of such matters. Therefore it avails Mr. Evans nothing to say that he was willing to take care of the child in Chattanooga, but not elsewhere. He has no right to control her whereabouts, and cannot make his duty to support her, if such duty exists, depend upon the place of the child's abode.

It results, therefore, that the sole question in this case is whether a father is liable for the support of his child, after a divorce obtained at the suit of the wife, when no provision is made in the decree for its maintenance, but the custody of the child is awarded to the mother.

We are of opinion that the father is so liable, and unquestionably this view is taken in the majority of the

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recent decisions upon the subject, although some courts of high repute have reached the opposite conclusion.

A convincing case adopting the former position is *Spencer v. Spencer*, 97 Minn., 56, 105 N. W., 483. This case is reported and annotated in 2 L. R. A. (N. S.), 851, and also reported and more exhaustively annotated in 7 Am & Eng. Ann. Cas., 901. In the latter volume cases are collected in a note from fourteen States, supporting the case reported. Both annotators find that the weight of modern authority imposes upon the father the obligation of the child's support, and to this effect is the later case of *Alvey v. Hartwig*, 106 Md., 254, 67 Atl., 132, 11 R. A. (N. S.), 678 also reported in 14 Am. & Eng. Ann. Cas., 250, with a note containing other cases upon the subject.

All the authorities upon both sides of this question will be found to be collected in the annotated publications just cited. The cases are too numerous to permit of an attempt to review them here.

The reasons favoring the majority view are that the law of nature and the law of the land require of the father the support of his minor children. This is a definite and fixed obligation, which both the children and society itself are entitled to have enforced against him. If divorce is sought by his wife, the mother of the children, it can only be obtained by her for some wrong or dereliction on the part of such husband and father, shown to have been committed. A divorce so obtained, at the wife's suit, cannot weaken the father's obligation to his children. The decree of divorce is founded upon

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his misconduct. To hold that such a decree discharged him from the support of his children would be to allow him to profit by his perversity, or, in familiar phrase, to take advantage of his own wrong.

And again, upon granting such divorce, the court will award the custody of the child as its interest demands. If because the father is an unsuitable person, or if for other reasons appearing to the benefit of the child, the court decrees that it shall be intrusted to its mother, such decree cannot be allowed to affect the primary obligation of the father for the child's maintenance. The child was blameless. It was not responsible for the differences of its parents. It was no party to the divorce proceedings, and should not be deprived of a father's support, by reason of matters over which it had no control.

Upon this subject the supreme court of Ohio has observed:

"The duty of the father to provide reasonably for the maintenance of his minor children, if he be of ability, is a principle of natural law, and he is under obligation to support them, not only by the laws of nature, but by the laws of the land. . . .

"This natural duty is not to be evaded by the husband so conducting himself as to render it necessary to dissolve the bonds of matrimony and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert

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his own misconduct into a shield against parental liability." *Pretzinger v. Pretzinger*, 45 Ohio St., 452, 15 N. E., 471, 4 Am. St. Rep., 542.

The opposite view taken by some of the courts, heretofore referred to, rests upon the idea that awarding the child to its mother deprives the father of its services, and that services and support are reciprocal. The father, being deprived of one, should be relieved of the other.

In regard to this contention the supreme court of Minnesota has very properly observed:

"This is not a good reason; for, if the divorce is granted for the father's misconduct, it is his wrong act that deprives him of their services, and not the court which intervenes for the protection of the children." *Spencer v. Spencer*, supra.

Along the same lines the supreme court of Maryland has said:

"His natural right to this custody and these services is forfeited by his misconduct, and surely, if his misconduct works a forfeiture of his rights to custody and earnings, he ought not to be absolved from his natural and usual duty of supporting them. To allow it to bring about any such results would simply be allowing the father to take advantage of his own wrong, for all a father would have to do, to avoid his natural obligation to his children, would be to desert his family, conduct himself in such a way as to show that he is an unfit person to have the custody of his children, and then, when, on account of his own wrongful doings and unfitness,

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the court takes the custody of the children away from him and awards it to the mother, it relieves him of the obligation which the law of nature and the law of the land places upon him." *Alvey v. Hartwig*, supra.

From what has been said, it follows that the circuit judge and the court of civil appeals were both in error in the disposition made of this case, and it must be reversed.

Complaint is made at the bar that the sum here demanded is an excessive allowance for the girl's support. Proof was introduced by the plaintiff below to the effect that this amount was reasonable and proper. The defendant below offered no evidence upon the subject.

We do not mean to hold in this opinion that any father is liable for an extravagant allowance for his child's support. He is only required to maintain the child in a manner commensurate with his means and station in life.

Although, in the absence of evidence to the contrary, the sum here demanded for the child's support must be regarded as reasonable, there being such proof in the record, it is not to serve as a standard or basis for future claims against this father. If other such demands cannot be amicably settled between the parties, and another suit is brought of like character with this, on the trial thereof the father may introduce proof as to his financial standing and ability, and any other pertinent proof, and future allowances will be based on the evidence so heard.

A judgment will be entered here for the amount sued for, and the defendant in error will pay all the costs.

Bauhard v. Truluck.

MELL BAUHARD *et al.* v. J. M. TRULUCK.

(*Knoxville*. September Term, 1911.)

1. **APPEALS.** In chancellor's discretion is the only mode of review of interlocutory decrees preparing cause for final hearing.

Under the statute (Acts 1903, ch. 248), authorizing chancellors, by consent of parties, to hear and determine, at chambers, certain matters relating to the preparation of cases for final hearing, and providing that chancellors may, in their discretion, allow appeals from such interlocutory decrees when pronounced as if the same were done at a regular term of the court, with certain limitations, the proceedings for the review of decrees so pronounced are limited to appeals in the discretion of the chancellor.

Acts cited and construed: Acts 1903, ch. 248.

Case cited and approved: Lindsay v. Allen, 112 Tenn., 637.

2. **SAME.** Final decrees pronounced and entered at chambers are reviewable upon writ of error as decrees of court in regular session.

Under the statute (Acts 1903, ch. 248, as amended by Acts 1905, ch. 427), authorizing chancellors, by consent of the parties, to hear and determine causes, upon the merits, at chambers, and to pronounce final decrees therein, and containing no limitation upon proceedings to review such decrees, final decrees so pronounced and entered at chambers are reviewable upon writ of error, and by all proceedings in error available to the losing party in causes finally determined by the court in regular session.

Acts cited and construed: Acts 1903, ch. 248; Acts 1905, ch. 427.

Case cited, distinguished, and approved: Lindsay v. Allen, 112 Tenn., 637.

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FROM GRAINGER.

Writ of error to the Chancery Court of Grainger County.—H. G. KYLE, Chancellor.

SHIELDS, CATES & MOUNTCASTLE and W. L. BASS, for complainants.

E. R. TAYLOR and W. N. HICKEY, for defendant.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

This cause is before the court upon motion made by the complainants to dismiss a writ of error sued out by the defendant to the chancery court of Grainger county for the purpose of having reviewed and reversed a final decree pronounced by the chancellor at chambers, under the provisions of chapter 248, Acts of 1903, as amended by chapter 427, Acts of 1905. The contention of complainants is that a decree so pronounced can only be reviewed by appeal, and *Lindsay v. Allen*, 112 Tenn., 637, 82 S. W., 171, is relied upon to support this contention.

The original act (chapter 248, Acts of 1903) authorizes the chancellor, by consent of parties, to hear and determine certain matters relating to the preparation of

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a case for final hearing at chambers, and provides that the chancellor in his discretion may allow an appeal from an interlocutory decree then pronounced as if the same was done at a regular term of the court, with certain limitations.

The case of *Lindsay v. Allen* construed the act of 1903 to limit proceedings for review of decrees pronounced under it to appeals, in the discretion of the chancellor. Such is the language of the act, and that construction is adhered to.

The act of 1905 authorizes the chancellor, by consent of parties, to hear and determine causes upon the merits at chambers and pronounce final decrees therein. It contains no limitations upon proceedings to review such decrees. Therefore all proceedings in error open to the losing party in causes finally determined by the court in regular session are available, where final decrees are entered at chambers, under this act. The reasons for the limitation contained in the first act, and for holding it inapplicable to the amendment, are obvious. The motion is disallowed.

Jacks v. Lumber Co.

R. G. JACKS v. WILLIAMS-ROBINSON LUMBER COMPANY.

(*Knoxville*. September Term, 1911.)

1. **NEW TRIALS.** Grounds other than those relied on in the circuit court for new trial cannot be assigned as error upon appeal.

Where the losing party in the circuit court moved for a new trial only upon the ground that the weight of the evidence preponderated greatly in his favor, he cannot upon appeal assign the additional error that there was no evidence to support the verdict, especially where the trial court has a rule requiring parties moving for new trials to assign specifically the errors relied upon; for it is a general rule that trial courts cannot be put in error on appeal upon questions of law or fact which have not been called to their attention. (*Post*, pp. 125-127.)

Cases cited and approved: *Wise v. Morgan*, 101 Tenn., 273; *Railroad v. Blair*, 104 Tenn., 212; *Railroad v. Johnson*, 114 Tenn., 641.

2. **SAME.** Rules of circuit court that motions for new trials must assign specific errors in writing will be sustained.

It is competent and advisable for trial judges to promulgate rules that, upon motions for new trials, no errors, except such as are assigned in the written motion, will be considered; and such rules will be sustained and enforced by the supreme court. (*Post*, pp. 127, 128.)

3. **SAME.** Question whether there is no evidence to support verdict is one of law to be determined first by trial judge.

The question whether or not there is no evidence to support the verdict is one of law, for determination in the first instance by the trial judge, and until it is in some way presented to, and passed upon by, the trial judge, such question cannot be considered upon appeal. (*Post*, p. 128.)

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- 4. SUPREME COURT PRACTICE.** Appellant must specifically point out the errors complained of, and affirmatively show their existence.

The supreme court will not search the record at large to find errors; for the presumption is that the judgment of the lower court is correct, and the burden is upon the appellant specifically to point out the errors complained of, and affirmatively show that they exist. (*Post*, pp. 128, 129.)

- 5. SAME. Same.** Any number of new trials upon the ground that there was no evidence to support the verdicts.

The statute (section 4850 of Shannon's Code) providing that not more than two new trials shall be granted to the same party is not applicable to a case in which there is no evidence to support the verdict; and where the record fails to show the grounds upon which the new trials were granted, the supreme court will presume that they were granted on the merits, and not for errors of law; that is, upon the ground that the evidence preponderated against the verdicts, and not upon the ground that there was no evidence to support the verdicts, nor upon errors of law, and the party who seeks to sustain the action of the court in granting a third or subsequent new trial must be able to show from the record that the new trials were granted upon some ground other than the merits as above defined. (*Post*, pp. 129, 130.)

Code cited and construed: Sec. 4850 (S.); sec. 3835 (M. & V.); sec. 3122 (T. & S. and 1858).

Cases cited and approved: *Turner v. Ross*, 1 Humph., 16; *Ferrell v. Alder*, 2 Swan, 77; *Railroad v. Hackney*, 1 Head, 169; *Burton v. Gray*, 10 Lea, 582; *Iron Co. v. Dobson*, 15 Lea, 416; *Railroad v. Mahoney*, 89 Tenn., 326.

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FROM MORGAN.

Appeal from the Circuit Court of Morgan County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—G. Mc. HENDERSON, Circuit Judge.

WRIGHT & JONES, for plaintiff.

PICKLE, TURNER & KENNERLY, L. RISEDEN, W. Z. STRICKLAND, and MRS. J. L. HUGHETT, for defendant.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This action for damages for personal injuries was tried before the circuit judge and a jury in Morgan county, and resulted in a verdict in favor of the plaintiff. The defendant below made a motion for a new trial upon the following grounds:

(1) Because the facts in the case do not warrant the verdict.

(2) Because the finding of the jury is not justified by the verdict.

(3) Because the weight of the evidence in the case preponderates greatly in favor of defendants, and the plaintiff is not entitled to recover of defendants in any sum whatever.

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This motion was overruled by the circuit judge, and judgment was pronounced upon the verdict. The case was appealed to the court of civil appeals, and substantially the same errors assigned there as those set out above. Upon application to that court, plaintiff in error was permitted to assign the additional error that there is no evidence to support the verdict.

The trial court has a rule that: "All motions for new trials must be reduced to writing and entered upon the minutes. The several grounds of error upon which new trials are asked, whether of law or fact, must be stated separately and specifically and numbered, and no errors will be considered except such as are assigned in said written motion in this manner."

Defendant in error relied upon this rule in the court of civil appeals, and objected to that court permitting the amended assignment of error. That court, in disposing of this objection, said:

"After due consideration, we have reached the conclusion that rules of lower courts requiring motions for new trials to be specific cannot be held to preclude the making of assignments that are peculiar to this court. In the matter of granting new trials this court proceeds from an entirely different standpoint from that controlling a trial judge. It is his duty, if he be of the opinion that the evidence preponderates materially against the verdict, and does not for that reason meet his approval, to grant a new trial. This court will not reverse the lower court in refusing to grant a new trial with respect to the evidence, unless the record shows that there is no

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material testimony to support the verdict. The assignment of error made will be considered by us."

This was error. No assignment of error in the appellate court can be said to be peculiar to that court, in contradistinction to assignments in the lower court of grounds for a new trial. While it is true that it is the duty of the trial judge to award a new trial upon the evidence, if he is of the opinion that the evidence preponderates against the verdict, and that this court and the court of civil appeals will not consider the weight of the testimony after the verdict of the jury has been approved by the trial judge, nevertheless the trial judge should be called upon to pass upon the question as to whether there is any evidence to support the verdict. The jurisdiction of the supreme court and the court of civil appeals is appellate only. The sole duty of these two courts is to revise the action of the trial court. The trial courts cannot be put in error upon appeal upon questions of law or fact which have not been called to their attention. Especially is this true where the trial court has a rule requiring parties complaining of the verdict of juries to specifically assign errors relied upon. *Railroad v. Johnson*, 114 Tenn., 641, 88 S. W., 169; *Railroad v. Blair*, 104 Tenn., 212, 55 S. W., 154; *Wise & Co. v. Morgan*, 101 Tenn., 273, 48 S. W., 971, 44 L. R. A. 548.

It is competent for trial judges to promulgate such rules, and this court will enforce them. Indeed, it would facilitate the disposition of litigation and tend to minimize appeals if all of the trial courts would enforce rules

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similar to the one under consideration. It may not infrequently happen that, if counsel will sharply call the attention of the trial judge to the error complained of, a new trial would be awarded and the necessity of an appeal obviated. Likewise it might also happen that, if the attention of counsel and court was sharply drawn to the points of fact and law in controversy, the court could convince counsel that no error had been committed.

Whether or not there is evidence to support the verdict is a question of law, to be determined by the trial judge. The better practice would be for counsel to move for a directed verdict, if it be conceived that the plaintiff's evidence does not present a case of liability. But, whether this motion is made or not, it is incumbent upon counsel to present to the court questions of law arising upon the assignment that there is no evidence to support the verdict. The fact that the trial judge must also determine the weight of the evidence and satisfy his own conscience as to the truth of the verdict does not militate in any degree against the necessity of having his action upon the legal questions presented by the assignment that there is no evidence to support the verdict. It is his concurrence with the jury in finding that the preponderance of the evidence is in favor of the verdict which gives rise to the rule of this court forbidding an assignment here upon the weight of the evidence. But this court will not search the record at large to find errors. The presumption is that the judgment of the lower court is correct. The burden is upon the appellant to specifically point out the errors complained of, and af-

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firmatively show that they exist. It is but fair to the trial judge, as well as to litigants, that all parties be required to specifically point out, upon motions for new trials, the errors complained of. This has long been the settled practice of this court, and especially is it true when the trial court has a rule requiring it. We have every disposition to encourage this practice, and no inclination to depart from it.

At section 3122 of the Code of 1858 (Shannon, section 4850) it is provided that not more than two new trials shall be granted to the same party in an action at law or upon the trial by jury of an issue of fact in equity. It has been held that that this statute is not applicable to a case in which there is no evidence to support the verdict, and in such case the trial judge may set aside even a third or any subsequent verdict in the same case upon motion of the same party. *Railway Co. v. Mahoney*, 89 Tenn., 326, 15 S. W., 652. It has also been held that, if the record fails to show the grounds upon which new trials are granted, this court will presume that they were granted on the merits, and not for errors of law, and the party who seeks to sustain the action of the court must be able to show from the record that the new trials were granted upon some other ground. *Turner v. Ross*, 1 Humph., 16; *Ferrell v. Alder*, 2 Swan, 77; *East Tenn. & Ga. R. Co. v. Hackney*, 1 Head, 169; *Burton v. Gray, Kirkman & Co.*, 10 Lea, 582; *Knoxville Iron Co. v. Dobson*, 15 Lea, 416. This is but an additional reason for trial judges promulgating and enforcing rules like

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the one under consideration, and of itself is sufficient reason for this court enforcing them. It preserves of record an accurate history of the motion for a new trial, which, under the section of the Code above referred to, the successful party must show in order to have the benefit of the two verdicts. The judgment of the court of civil appeals, reversing the case, is reversed, and that of the lower court is affirmed.

Crockett v. State.

ED CROCKETT v. STATE.

(Knoxville. September Term, 1911.)

- 1. INDICTMENT.** For assault with intent to commit murder in the first degree will support verdict of guilty of an attempt to commit voluntary manslaughter.

An indictment for assault with intent to commit murder in the first degree will support a verdict of guilty of an attempt to commit voluntary manslaughter, under the statute (section 7195 of Shannon's Code), providing that, upon an indictment for any offense consisting of different degrees, the jury may find the defendant guilty of any degree inferior to the degree charged, or of an attempt to commit the offense. (*Post*, pp. 132, 133.)

Code cited and construed: Sec. 7195 (S.); sec. 6061 (M. & V.); sec. 5222 (T. & S. and 1858).

Cases cited and approved: *Smith v. State*, 2 Lea, 614; *Lawless v. State*, 4 Lea, 177; *State v. Ragsdale*, 10 Lea, 672; *Stevens v. State*, 91 Tenn., 726.

- 2. BILLS OF EXCEPTIONS.** Matters not appearing in bill of exceptions, though appearing on a separate paper, cannot be considered.

Matters not appearing in the bill of exceptions, though appearing upon a separate paper accompanying the record, cannot be considered upon appeal. (*Post*, p. 133.)

FROM McMINN.

Appeal from the Circuit Court of McMinn County.—
SAM O. BROWN, Judge.

Crockett v. State.

SAM EPPS YOUNG, L. H. LASITER, and TRAYNOR & SMITH, for Crockett.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted for an assault with intent to commit murder in the first degree upon the body of one James Maxwell. The jury rendered a verdict of "guilty of an attempt to commit voluntary manslaughter," and fixed his punishment at two years in the State penitentiary. From this judgment he has appealed to this court and assigned errors.

The first error assigned is upon the refusal of the trial judge to set aside the verdict because the jury found the defendant guilty of a crime not included in the indictment. This assignment must be overruled.

It has been held that an indictment for an assault with intent to commit murder in the first degree will support a verdict of guilty of an assault with intent to commit murder in the second degree, under Shannon's Code, section 7195 (Code of 1858, section 5222). This section reads as follows:

"Upon an indictment for any offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offenses; and the defendant may also be found guilty of any offense, the commission of which is neces-

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rarily included in that with which he is charged, whether it be a felony or misdemeanor.”

This construction was given the section referred to in *Smith v. State*, 2 Lea, 614; *Lawless v. State*, 4 Lea, 177; *State v. Ragsdale*, 10 Lea, 672, and in *Stevens v. State*, 91 Tenn., 726, 20 S. W., 423, it was held that it would apply to a case of voluntary manslaughter. In the latter case this was said *arguendo*; in order, however, to distinguish it from the supposed crime of an assault with intent to commit involuntary manslaughter. It was said that there was no such offense as the latter, but that under the section referred to one might be convicted of an assault with intent to commit voluntary manslaughter under a charge of an assault with intent to commit murder in the first degree. The verdict in that case was guilty of an “attempt to commit” involuntary manslaughter. No point was made upon this feature; that is, upon the finding of an “attempt to commit,” instead of an “assault with intent to commit.” However, this kind of verdict is expressly authorized by the section of the Code above quoted. Therefore the verdict of the jury in the present case was a proper response to the indictment.

It is assigned as error that the names of the jurors were not drawn in the manner required by law; also that a stranger was in the jury room while the jury were deliberating upon their verdict. These matters appear upon a separate paper accompanying the record, but do not appear in the bill of exceptions, and cannot be considered.

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Finally, it is said that the verdict is not sustained by the evidence. After careful consideration of all the evidence in the record, we are fully satisfied with the verdict.

It results that the judgment of the trial court must be affirmed.

Cement Co. v. Oliver.

ALPHA PORTLAND CEMENT COMPANY v. WILLIAM J.
OLIVER.

(*Knorrville*. September Term, 1911.)

1. **SALES.** Contract for delivery of goods in monthly installments is breached by purchaser's failure to pay for any installment as stipulated; and seller may sue for damages sustained.

Where a contract for the sale and purchase of goods provides that they shall be delivered in approximately equal monthly quantities or installments for a period of ten months, and shall be paid for within thirty days after each delivery, the purchaser's failure to pay for one or more installments according to the terms of such contract amounts to a breach of the contract by him, and the seller may treat such failure as going to the whole contract, and consider the entire contract terminated, and sue for the damages sustained. (*Post*, pp. 136-138.)

Cases cited and approved: Foundry Co. v. Wheel Co., 113 Tenn., 370; Steel & Iron Co. v. Nailor, 9 App. Cas., 434; Norrington v. Wright, 115 U. S., 188.

2. **SAME.** Same. Measure of damages for breach of such contract by the purchaser.

Where a contract for the sale and purchase of goods to be delivered and taken in approximately equal monthly quantities or installments for a specified period, with payment for each installment to be made within a certain time, is breached by the purchaser's failure to pay for any installment within the specified time, the seller, electing to treat the contract as terminated, may, where the contract price exceeds the market value, sue for and recover as damages the difference between the contract price and the market value at the delivery time and for the average quantity deliverable at each monthly period, and not such difference on the whole quantity at the expiration of the whole contract. (*Post*, pp. 136, 137, 138-142.)

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Cases cited and approved: *Cole v. Zucarello*, 104 Tenn., 65; *Mayberry v. Mill Co.*, 112 Tenn. 565; *Lumber Co. v. Title Co.*, 121 Ill. App., 298; *Johnson v. Allen*, 78 Ala., 392; *Hosiery Co. v. Cotton Mills*, 140 N. C., 452.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
WILL D. WRIGHT, Chancellor.

GRIMM & WEBB, for complainant.

GREEN, WEBB & TATE and LINDSAY, YOUNG, SMITH &
DONALDSON, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is a suit to recover damages for the breach of a contract to purchase a stipulated quantity of cement, and also to recover the value of cement furnished by the complaint to defendant prior to the breach.

On the 27th day of February, 1907, after considerable correspondence had between them, the Alpha Portland Cement Company and William J. Oliver entered into a contract whereby the latter undertook to purchase from the former a minimum quantity of 54,000 barrels of cement, at \$1.40 per barrel f. o. b. cars at the mills of the cement company, "shipments to be made as ordered during the balance of year 1907, to Chattanooga, Tenn., in

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approximately equal monthly quantities." The terms of payment were one per cent. off for cash in ten days from date of invoice, or thirty days net from date of invoice.

It will thus be seen that under the terms of this contract Mr. Oliver obligated himself to take from the cement company an approximate monthly amount of 5,400 barrels of cement, for which he was to pay \$1.40 per barrel. The contract covered a period of ten months; that is, from the 27th of February, 1907, to the 1st of January, 1908.

On the trial of the case below, the chancellor rendered a decree in favor of the cement company for \$851.16, the balance due at that time, represented by notes, on cement delivered by it, and also decreed that the cement company was entitled to recover as damages, for breach of this contract by Mr. Oliver, the sum of \$829.50.

Both parties have appealed from the chancellor's decree, and assign errors. The principal matter involved in the case, and the only one which will be discussed in this opinion (other matters having been disposed of orally), is the right of the complainant to recover damages; and if so entitled, the proper measure of damages.

Up to and including September, 1907, Mr. Oliver ordered and received from the cement company 24,235 barrels of cement. On October 21, 1907, the defendant, Oliver, wired the cement company to ship him a car of cement; he having ordered none previously during that month. At this time Mr. Oliver's account with the cement company was considerably in arrears, and past due

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to the extent of \$5,598.40. This arrearage extended back to July 9, 1907. So, responding to the telegram just referred to, the cement company answered, and declined to ship any more cement until the past-due account was paid.

It will be remembered that the terms of payment provided in this contract were one per cent. off for cash in ten days, or thirty days net from date of invoice. We therefore have a case in which a contract, covering a period of ten months, goods to be delivered in approximately equal monthly installments, and paid for within thirty days from shipment, was breached by the defendant failing to make payments as stipulated. That such a failure to make payments works a breach of the whole contract is no longer a matter for discussion in this State. This question was considered by the court in the case of *Foundry Co. v. Wheel Co.*, 113 Tenn., 370, 83 S. W., 167, 68 L. R. A., 829, and it was there held that a failure to pay for one or more installments according to the terms of such a contract amounted to a breach thereof, and authorized the seller to hold the entire contract as rescinded. It was pointed out in this case just referred to that the authorities are in conflict as to the rights of the respective parties to a contract such as this, under the circumstances detailed; but this court, following *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas., 434, *Norrington v. Wright*, 115 U. S., 188, 6 Sup. Ct., 12, 29 L. Ed., 366, and other cases cited, held that where, in a contract with a buyer, a seller has provided for a succession of deliveries, with payments for each delivery,

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and the buyer fails to pay for any delivery within the stipulated period, the seller might treat such failure as going to the whole contract, and consider the entire contract terminated.

We are aware that many courts of the highest repute hold contracts, like the one under consideration here, to be severable or divisible. In those jurisdictions a failure to pay one or more installments, according to stipulation, would not authorize the seller to treat the entire contract as rescinded; but this court has taken the other view, as we believe upon better authority, and the rule announced in *Foundry Co. v. Wheel Co.*, supra, will be adhered to.

Accordingly the cement company was entirely within its rights in declining to make further shipments to Mr. Oliver until he had paid his past due account. This action on its part was no breach of the contract, as has been urged here. The contract was breached by the defendant when he failed to make payments for the several shipments received by him as he had agreed to do.

When Mr. Oliver breached this contract with the cement company, the company was, of course, entitled to recover from him the value of the goods previously shipped to him; also to the recovery of lawful damages sustained by reason of his breach.

The damage sought to be recovered by the cement company is the difference between the contract price of the cement ordered by Mr. Oliver and the market price. The claim is that Mr. Oliver agreed to take from it, at \$1.40 per barrel, the minimum quantity of 54,000 barrels

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during the term of this contract, which ended January 1, 1908. It is shown that he he only took 24,235 barrels, when he should have taken 54,000 barrels, a difference of 29,765 barrels. It is said that on January 1, 1908, the market price of cement had declined to \$1.20 per barrel, and that therefore the cement company was entitled to have as damages from Mr. Oliver twenty cents a barrel on 29,765 barrels, the difference between the number of barrels he bought and the number he agreed to buy.

The cement company in this case elected to keep this property as its own after the breach, and to recover from Mr. Oliver the difference between the contract price and the market price. This it had a right to do. *Mayberry v. Lilly Mill Company*, 112 Tenn., 565, 8 S. W., 401; *Cole v. Zucarello*, 104 Tenn., 65, 56 S. W., 850. The difference between the contract price and the market value, however, must be calculated as of the time and place of delivery under the contract. It is so stated in the cases cited and others there referred to.

Although the question seems not to have heretofore arisen in this State, it is well settled in other jurisdictions that when, under the contract, goods are to be delivered by installments or at stated periods, the time of delivery will be the date for the delivery of each installment successively; the damage being the aggregate of these differences, estimated as of these respective dates. *Sutherland on Damages*, section 651; *Wood's Mayne on Damages*, section 206.

"The law is that where goods are to be delivered in installments, or as requested by the purchaser, the true

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measure of damages is the difference between the contract price and the market price or value at the times when such articles were required ordered." *Sagola Lumber Co. v. Chicago Title, etc., Co.*, 121 Ill. App., 298.

"Where the goods are to be delivered by installments, and there is a failure to deliver two or more, or all, of the installments, the proper measure of damages is the sum of the differences between the contract and market prices of the quantity of each installment not delivered at the respective times of delivery and place of delivery." *Johnson v. Allen*, 78 Ala., 392, 56 Am. Rep., 34. See, also, *Crescent Hosiery Co. v. Mobile Cotton Mills*, 140 N. C., 452, 53 S. E., 140, 6 Am. & Eng. Ann. Cas., 164. A note under this case collects many cases, English and American, and they are uniform in announcing the rule to be as stated above. We regard this rule sound.

So the cement company is not entitled to recover from Mr. Oliver, as of the date of the expiration of the contract, the difference between the contract price and the market price of the entire amount of cement he contracted for and failed to take upon the stipulated terms; but, as the cement was to be delivered in installments of approximately 5,400 barrels per month, it can only recover the sum of the differences between the contract and market prices of that number of barrels for each month that the breach existed.

Referring to the testimony of the officers of the cement company, we find it stated by them that the cement market began to sag a little during the month of Septem-

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- ber, but there was no substantial break in prices until October, 1907. It is true that, in an affidavit permitted to be filed in this case by one of the complainant's witnesses, it is attempted to be shown that there was a slight difference between the market price of cement and the contract price during the months of August and September. We prefer, however, to take as true the statements made by these witnesses in their depositions, from which we conclude, as said by one of them, that there was no substantial break in prices of this commodity until October.

Looking to the evidence, we find that the market price of cement during the month of October was \$1.25 per barrel, and during the months of November and December was \$1.20 per barrel. The contract price was \$1.40 per barrel. Of course, complainant would not be entitled to recover damages for any month prior to the drop in prices. There was no damage and no loss during such months. Complainant, however, is entitled to recover damages as follows:

For 5,400 barrels during the month of October, at 15 cents per barrel, \$810.

For 5,400 barrels during the month of November, at twenty cents per barrel, \$1,080; and a like sum for the month of December.

The total amount of complainant's damages on this basis will be \$2,970.

The chancellor's decree on the notes will be affirmed. As to damages, his decree will be modified, so as to increase the amount to \$2,970. Defendant will pay the costs.

State v. White.

STATE v. CARL WHITE *et al.*

(Knoxville. September Term, 1911.)

1. **CRIMINAL LAW.** Judgment must impose separate or several punishments against defendants jointly convicted, except in offenses requiring joint agency.

Where two or more persons jointly presented or indicted are convicted, the judgment or sentence against them must impose separate or several punishments, unless the agency of two or more is the essence of the offense, as in conspiracy or riot; for each and every person who violates the criminal laws is subject to the whole penalty denounced. (*Post*, pp. 145, 146.)

2. **SAME.** Same. Punishment must be inflicted upon each for violation of four mile law.

The provision of the four mile law (Acts 1909, ch. 1, restricting the sales of intoxicating liquors) that "any one" violating it "shall be punished by a fine for each offense of not less than fifty dollars nor more than five hundred dollars, and be imprisoned for a period of not less than thirty days nor more than six months," is mandatory, so that, where four persons were jointly convicted of violating the act, the court was bound at least to impose the minimum punishment on each defendant, and could not impose a joint fine and imprisonment on all. (*Post*, p. 146.)

Acts cited and construed: Acts 1909, ch. 1.

Cases cited and approved: *France v. State*, 6 Bax., 478; *Needener v. State*, 1 Shannon's Cases, 374; *Tarrant v. State*, 4 Lea, 483; *McCampbell v. State*, 116 Tenn., 109.

3. **SAME.** Sentence of imprisonment cannot be suspended until next term.

The court has no jurisdiction to suspend, until the next term, that part of the sentence imposing imprisonment upon defendants convicted of the violation of a criminal statute. (*Post*, pp. 146, 147.)

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4. **SAME.** Same. Unauthorized suspension of sentence of imprisonment presents no question after its expiration.

Where the period of unauthorized suspension of the sentence of imprisonment has expired, such suspension presents no live question to be passed upon by the supreme court. (*Post*, p. 147.)

FROM HAMILTON.

Writ of error to the Criminal Court of Hamilton County.—S. D. McREYNOLDS, Judge.

ATTORNEY-GENERAL CATES, for State.

WILLIAMS & LANCASTER, SPEARS & LYNCH, and E. H. WILLIAMS, for defendants.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

The defendants, Carl White, John H. Conner, Thos. P. Hagan and J. H. Kelly & Co., the latter a corporation, were jointly presented by the grand jury of Hamilton county, charged with unlawfully selling intoxicating liquors as a beverage in violation of chapter 1, Acts 1909, commonly known as the "Four Mile Law." The case was called for trial March 3, 1911, and upon a plea of guilty entered by White, Conner, and Hagan the court adjudged that they were guilty of the offense charged in the presentment, "and that for such offense they pay a joint fine of \$100 and the costs of the case; and that, in

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default of paying and securing said fine and costs, they be confined in the common jail or workhouse of Hamilton county until the same are worked out as prescribed by law."

The defendants were also severally adjudged as further punishment for their offense to be imprisoned for the term of sixty days, the execution of which latter judgment, however, was suspended until the next term of the court.

The case is now before us upon a writ of error prosecuted by the State. The error first assigned is that the trial judge erred in imposing a joint fine upon the three defendants for \$100, the contention of the State being that a separate fine of not less than the minimum sum imposed by the statute, \$50, should have been adjudged against each.

This contention is sound, and must be sustained. Where two or more persons jointly presented or indicted are convicted, the general rule is that the judgment and sentence against them must be separate. There may be but one judgment, but the sentence, the punishment, must be several. The only exceptions to this rule are cases where the agency of two or more is of the essence of the offense, as in conspiracy and riot. Each and every one who violates the criminal laws is subject to the whole penalty denounced. There is no partnership in crime, and there can be no division of the punishment that follows its commission. Payment of a fine by one of several offenders cannot be allowed to relieve others

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equally guilty any more than the imprisonment of one will satisfy the law as to others. The guilt of one neither enhances nor mitigates that of the others. Every one is answerable for his own offense. Where the law imposes a minimum fine for an offense committed, and several are jointly indicted, each one adjudged guilty is severally subject to it and must be so sentenced. Otherwise, one of them might be required to pay the entire joint fine imposed to obtain his liberty by the default of the others, and thus the latter escape all punishment. This would work injustice to defendants. The authorities upon this question seem to be in accord. Wharton's Pleading & Practice, sections 314-940; 19 Ency. Pl. & Pr., p. 468; Bishop's New Criminal Law, sections 954-957.

The four mile law provides that "any one" violating its provisions "shall be punished by a fine for each offense of not less than \$50 nor more than \$500 and be imprisoned for a period of not less than thirty days nor more than six months." This is mandatory. The courts have no discretion upon a verdict of guilty by a jury, or a plea of guilty, to impose less than the minimum nor more than the maximum fine and imprisonment prescribed upon each defendant. *France v. State*, 6 Baxt., 478; *Needener v. State*, 1 Shan. Cas., 374; *Tarrant v. State*, 4 Lea, 483; *McCapbell v. State*, 116 Tenn., 109, 93 S. W., 100.

Error is also assigned upon the action of the trial judge in suspending the imprisonment severally imposed upon the defendants. While this action was beyond the power of the trial court as held in another case

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at this term, the period of the suspension appears to have expired, and therefore this is not a live question to be passed upon in this case and is not done.

The judgment will be corrected so as to impose the minimum fine denounced by the statute upon each of the defendants, but for costs it will be joint, as there is only one case.

Plow Co. v. Hays.

CHATTANOOGA PLOW COMPANY *v.* W. P. HAYS, *County Court Clerk, et al.*

(*Knoxville*. September Term, 1911.)

1. **TAXATION.** Manufacturer of implements selling same to jobbers and commission merchants only is not a "dealer" or "merchant," within the meaning of the taxation laws.

A manufacturer of agricultural implements is not a "dealer" or "merchant," within the meaning of our revenue and assessment laws (Acts 1907, ch. 602, secs. 8, 26, and 27, and Acts 1909, ch. 479, sec. 3), providing for the taxation of dealers and merchants where the sales of the manufactured articles are made, without a dealer's profit, to jobbers and commission merchants only, and the only profit taken is for the manufacturing. (*Post*, pp. 150-158.)

Acts cited and construed: Acts 1907, ch. 602, secs. 8, 26, 27; Acts 1909, ch. 479, sec. 3.

Cases cited and distinguished: *Webb v. State*, 11 Lea, 662; *Taylor v. Vincent*, 12 Lea, 282; *Kurth v. State*, 86 Tenn., 137; *Steel & Wire Co. v. Speed*, 110 Tenn., 524; *Kelly v. State*, 123 Tenn., 516.

2. **SAME.** Construction of statutes by executive officers in favor of taxpayers, and long acquiesced in, is entitled to great consideration.

A construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially is this so as respects statutes prescribing penalties or levying taxes and impositions, where the executive construction has been in favor of the persons affected, and acquiesced in by the State authorities. (*Post*, p. 155.)

Cases cited and approved: *Insurance Co. v. Hoge*, 21 How., 35; *United States v. Compania*, 209 U. S., 337; *United States v. 1412 Gallons of Distilled Spirits*, 10 Blatchf., 428.

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3. **SAME. Same.** Statutes levying taxes will not be extended by implication beyond their clear import, and doubts will be resolved in favor of taxpayers.

Statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy; and all questions of doubt will be resolved against the government, and in favor of the citizen, because burdens are not to be imposed beyond what the statute expressly imports. (*Post*, p. 155.)

Cases cited and approved: *Memphis v. Bing*, 94 Tenn., 644; *English v. Crenshaw*, 120 Tenn., 531; *Crenshaw v. Moore*, 124 Tenn., 528.

4. **WORDS AND PHRASES.** A "dealer" is defined.

In the most restricted sense, a "dealer" is one who takes profit in the distribution of goods and wares to the trade, in addition to the manufacturer's profit. (*Post*, p. 156.)

5. **SAME. Same.** Manufacturers, merchants, and dealers are defined and distinguished; manufacturer becomes a merchant, when.

A "manufacturer" is one engaged in making materials, raw or partly finished, into wares suitable for use. A "merchant" is markedly distinguished from a manufacturer, in that he sells to earn a profit, and the manufacturer sells to take a profit already earned. While a manufacturer selling his own manufactured articles is a dealer, still his dealings are merely incidental to his occupation of manufacturer. If a manufacturer deals as a merchant, either in his own wares or those of others, he is a merchant; and any course of business by which a dealer's profit is added to that of the manufacturer would make the manufacturer a merchant. (*Post*, pp. 156-158.)

Case cited, distinguished, and approved: *Steel & Wire Co. v. Speed*, 110 Tenn., 524.

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FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—
T. M. McCONNELL, Chancellor.

WHEELER, MARTIN & TRIMBLE, for complainant.

ATTORNEY-GENERAL CATES, PRITCHARD & SIZER, and
CHAMBLISS & CHAMBLISS, for defendants.

MR. JUSTICE LANSDEN delivered the opinion of the
Court.

The question for decision in this case is whether the Chattanooga Plow Company, a Tennessee corporation, and a manufacturer of plows, cane mills, and other agricultural implements, is a dealer or merchant, within the meaning of our revenue statute, so as to be liable for a merchant's tax. The complainant is taxed as a manufacturer, and has paid all taxes assessed against it as such. Its business extends all over the world, and far more of its goods are exported to foreign lands, or shipped to other States of the United States, than are used or sold within the State of Tennessee. Less than ten per cent. of its sales are made in Tennessee. Most of complainant's goods are manufactured to fill orders already received. Some are made up in order to keep its factory

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in operation and its men employed when orders for goods have not been actually booked, but it is known they will be required by dealers and commission merchants who handle its products. It does not manufacture to keep stock on hand for sale generally. Its ware-rooms are adjacent to its factory, and are places of temporary storage, and not salesrooms. Its travelling men begin in the spring to take and send in orders for fall delivery, and in the fall to take orders for spring delivery. They also take orders for immediate delivery. It does not keep any goods on exhibit. Its plows, cane mills, and other products are not put together and set up in its warehouse, but are knocked down ready for shipment. They merely pass from the different departments where made into the warehouse or shipping departments, and pass on through to wagons or railroad cars. It has no storerooms, salesrooms, or place of business apart from its factory. All of its products are sold by merchants who keep them on exhibit and sale.

Complainant has been in business in Hamilton county, Tenn., for twenty-eight years, and has never been called upon to pay any license, or privilege taxes, in the nature of the taxes now demanded. The defendants are seeking to hold the complainant liable for a merchant's tax, together with fifteen per cent. penalties, alleged to have accrued thereon for three years.

The acts of the assembly, which it is insisted make complainant liable for the tax demanded, are chapter 479, Acts of 1909, section 3 of which provides as follows:

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“That all merchants shall pay an *ad valorem* tax upon the average capital invested by them in their business of fifty cents on the \$100, thirty-five cents of which shall be for State purposes and fifteen cents for school purposes; and a privilege tax of fifteen cents on each \$100 worth of taxable property, seven and one-half cents of which shall be for school purposes and seven and one-half cents for State purposes.”

Assessment Act 1907, c. 602, section 26, defines the term “merchant” as follows:

“All persons, copartnerships, or corporations engaged in trading or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats, or other craft stationed or plying in the waters of this State, and confectioners, whether such goods, wares, or merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered.”

Section 26, subsec. 1, of the assessment act, defines the method of applying the rates of taxation provided by the act of 1909, *supra*, to be upon the average amount of capital invested by the merchant in his business. Section 27 provides as follows:

“That no merchant, firm, company, copartnership, corporation, agent, or trader shall commence or continue a business declared to be a privilege under this act or the revenue act in any county of this State without obtaining license from the clerk of such county in accordance with the previous provisions of this act.”

Class 9 of section 8 is defined as follows:

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“All personal property which is a part of the capital invested in the business of a merchant, commission, or auction merchant, factors, or manufacturers shall not be assessed separately as personalty, but shall be assessed as part of the capital as provided in section 26th this act.”

Under the foregoing statutes, it is insisted by the State that the allegations of the bill show that the complainant is a trader or dealer in goods, wares, and merchandise, and is therefore a merchant, as defined by section 26, act of 1907, *supra*. It is insisted that the complainant falls within the authority of *Kurth v. State*, 86 Tenn., 137, 5 S. W., 593; *Webb v. State*, 11 Lea, 662, and *American Steel & Wire Co. v. Speed*, 110 Tenn., 524, 75 S. W., 1037, 100 Am. St. Rep., 814. The learned attorney-general interprets the foregoing cases as holding that a manufacturer, selling his own manufactured articles, is a dealer, although he does not buy to sell again, and is taxable as such.

We will first observe that *Kurth v. State*, *Webb v. State*, and *Taylor v. Vincent*, 12 Lea, 282, 47 Am. Rep., 338, are whisky cases, involving the *status* of whisky dealers under the whisky revenue statutes, and, therefore, do not fall within the same class of authority as *American Steel & Wire Company v. Speed*. It has been determined by this court, and we think it is generally understood by the profession, that statutes enacted for the purpose of raising revenue upon intoxicating liquors have a two-fold legislative purpose, and their enforcement has been administered with this double purpose in

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view. They not only provide revenue for the government, but such revenues are placed at a high figure, so that the collection of them aids materially in the regulation of the traffic. *Kelly & Co. v. State*, 123 Tenn., 516, 132 S. W., 193. This was recognized by the court in *Kurth v. State*, though not expressly stated in terms. In that case the court, speaking through Mr. Justice Lurton, said:

“If the sale of wine under the circumstances of this case may be made without license, then every distiller, or other manufacturer of liquor out of the produce of the State, can become a tippler, and the regulation of the business of selling liquors as regulated by statute practically swept away. In the contest between the taxed liquor dealer and the untaxed class of manufacturers the former would go down, the revenues of the State would be largely depleted, and the business or occupation of selling liquors become the only untaxed occupation.”

Such statutes rest both upon the taxing power and the police power. While revenue is derived from them, its collection is a wholesome and valuable police regulation of a business that is generally regarded as injurious to the public morals.

So this line of cases, while entirely sound, is not parallel to the case under consideration, and may be dismissed without further comment. Before determining the nature of the complainant's occupation or business, it is proper to remark that the assessment and revenue statutes of this State, in force for a great number of

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years, have been similar in their terms to those under consideration, and the executive department of the government has never before construed them as imposing a merchant's or dealer's tax upon manufacturers such as complainant. The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration. *United States v. Cerecedo Hermanas Y Compania*, 209 U. S., 337, 28 Sup. Ct., 532, 52 L. Ed., 821; *Union Insurance Company v. Hoge*, 21 How., 35, 16 L. Ed., 61; Cyc., vol. 36, p. 1140. The weight of such construction is of especial force in the case of statutes prescribing penalties, or levying impositions, where the executive construction has been in favor of the persons affected. *United States v. 1,412 Gallons of Distilled Spirits*, 10 Blatchf., 428, Fed. Cas., No. 15,960.

It is also a settled rule of interpretation in this State that statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy. All questions of doubt arising upon the construction of the statute will be resolved against the government, and in favor of the citizen, because burdens are not to be imposed beyond what the statute expressly imports. *English v. Crenshaw*, 120 Tenn., 531, 110 S. W., 210, 17 L. R. A. (N. S.), 753, 127 Am. St., Rep. 1025; *Memphis v. Bing*, 94 Tenn., 644, 30 S. W., 745; *Crenshaw v. Moore*, 124 Tenn., 528, 137 S. W., 924.

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With the foregoing rules of construction in view, can it be said that the complainant is a merchant, or dealer, in the sense that it is liable for an occupation tax as such? We think not. The most restricted definition that can be given to the term "dealer" is one who takes profit in the distribution of goods and wares to the trade, in addition to the manufacturer's profit. A manufacturer is one engaged in making materials, raw or partly finished, into wares suitable for use. Anderson's Dictionary of Law; Webster. The marked distinction between a manufacturer and a merchant is that the merchant, or dealer, sells to earn a profit, and the manufacturer sells to take profit already earned. He must buy the materials out of which to make his finished product, and he must sell the product of his factory after it is finished. But such dealings are not his occupation. The one supplies him with the materials with which to pursue it, while the other merely enables him to take the profit earned.

All the useful secular occupations are conducted for profit. A fair return upon the capital invested by the owner, reasonable compensation for the organization and management of the business, a just wage for the laborer, are honorable incentives to useful human endeavor, and constitute the real value of the occupation. Whatever form of activity the occupation may take, its final and ultimate purpose is to reap the rewards of risk, thought, and labor in the realization of profit. The occupation itself cannot be separated from the right to take profits earned in its pursuit. The right to take

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profit inheres in the right to pursue the occupation. Were it not so, the energies of the industrial world would become paralyzed and the labor of free men would be no better than that of felons. Civilization, as we know it, would crumble with decay, and all profitable enterprise would come to an end.

The complainant sells nothing except the product of its own factory, and does not sell that for a dealer's profit. Its only sales are to jobbers and commission men, and the only profit it takes is for manufacturing the articles sold. While it deals, and is a dealer, its dealings are merely incidental to its occupation of manufacturer. The case of *American Steel & Wire Company v. Speed*, supra, is not in conflict with the views here stated. That was the case of a manufacturer dealing as a merchant. If he deals as a merchant, either in his own wares or those of others, he is a merchant. Any course of business by which a dealer's profit is added to that of the manufacturer would make the manufacturer a merchant. The Steel & Wire Company added a middleman's profit to that which it had earned as a manufacturer by massing its wares made in different States at Memphis and distributing them to the trade from warehouses there. It was held to be a dealer, not because the warehouses in Memphis were widely separated from its various factories in other States, but because it was enabled to add a profit to that which it could have received, had it distributed its wares from its factories by the course of dealing with the warehouseman and transfer company and river transporta-

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tion. This was clearly capital invested in, and labor added to, the finished product in order to earn a profit in the business of distributing the wares to the trade. It is easily distinguishable from the initial sale by manufacturer to distributor. It does not alter the case that the profit was derived from cheaper transportation, economy in handling the goods, or whatever its source. It was a dealer's and not a manufacturer's profit, earned upon additional investment in and labor bestowed upon the wares, after their manufacture, in the process of distributing them to the trade. The goods were massed in and distributed for profit from this State, and were therefore taxable here.

But the case of complainant is the converse of the case of the American Steel & Wire Company. The complainant has no storerooms apart from its factory, and does not store its wares, except to fill orders received, or which, as a result of many years of experience and close business calculation, it can safely anticipate. The only profit it seeks or receives in the act of distributing its wares is the profit earned in manufacturing them. This, we think, clearly shows that it is not a merchant, and is not liable for the occupation tax sought to be imposed upon it. The result is that the decree of the chancellor is affirmed, and upon the agreement of counsel in the record the temporary injunction heretofore granted will be made perpetual.

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J. T. SMITH *et al.* v. C. CROSS *et al.*

(*Knorrville*. September Term, 1911.)

1. **STATUTES OF LIMITATIONS.** Deed fraudulent and void as against minors may be an assurance of title under adverse possession.

Although a deed of conveyance of land is fraudulent and void as against the minor owners, yet, if it purports on its face to convey an estate in fee, it is an assurance of title, so that the statutes of limitations will run in favor of the adverse possessor holding under said deed, and will perfect his title after the requisite period of adverse possession. (*Post*, pp. 167-170.)

Cases cited and approved: Gray v. Darby, M. & Y., 396; Love v. Shields, 3 Yerg., 408; Vance v. Johnson, 10 Humph., 214; Blantire v. Whitaker, 11 Humph., 313, 317, 318; Clark v. Chase, 5 Sneed, 636; Hunter v. O'Neal, 4 Bax., 494; Thurston v. University, 4 Lea, 513 (and citations); Nelson v. Trigg, 4 Lea, 701 (and citations); Ramsey v. Quillen, 5 Lea, 184; McBee v. Bearden, 7 Lea, 731; Goodloe v. Pope, 3 Shannon's Cases, 634; Hubbard v. Godfrey, 100 Tenn., 150; Boro v. Hidell, 122 Tenn., 80, 99.

Case cited as overruled: Waterhouse v. Martin, Peck, 392, 409.

2. **SAME.** Husband jointly occupying wife's land with her cannot assert adverse claim under adverse possession.

The wife's possession of land, held jointly with her husband, under an assurance of title conveying to her an estate in fee therein, presumptively inures to her benefit under the statutes of limitations, though the husband receives a grant from the State covering the same land which conveyed nothing because the State had previously granted the land; for the law will not permit the husband, while living with his wife and in joint possession of her land, or occupying her land with her, to assert an adverse claim to the land under adverse possession. (*Post*, pp. 170-172.)

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Constitution cited: Sched. 4 to const. of 1870.

Cases cited and approved: *Fancher v. De Montegre*, 1 Head, 40, 41; *Ramsey v. Quillen*, 5 Lea, 184, 192; *Templeton v. Twitty*, 88 Tenn., 595; *Woodruff v. Roysden*, 105 Tenn., 491.

3. SAME. Same. Presumption that the possession is with the legal title.

The legal presumption is that the possession of land is in the person having the legal title. (*Post*, p. 171.)

Cases cited and approved: *Foster v. Jordan*, 2 Swan, 476, 480, 481; *Welcker v. Staples*, 88 Tenn., 49, 51; *McLemore v. Duri-vage*, 92 Tenn., 482, 492.

4. SAME. Same. Same. Wife's land so acquired by adverse possession descends to heirs, subject to husband's curtesy.

Where husband and wife jointly hold the adverse possession of land under her assurance of title for more than seven successive years, the title becomes vested in her under the statute of limitation (section 4456 of Shannon's Code); and upon her death descends to her heirs at law, subject to the husband's tenancy by the curtesy. (*Post*, p. 172.)

Code cited and construed: Sec. 4456 (S.); sec. 3459 (M. & V.); sec. 2763 (T. & S. and 1858).

Case cited and approved: *Templeton v. Twitty*, 88 Tenn., 595.

5. SAME. Same. Same. Same. Tenant by curtesy or his grantees cannot acquire title adverse to remaindermen by adverse possession.

Since a tenant by the curtesy is at least a quasi trustee for the remaindermen, and holds possession for the protection of the fee as well as of his own estate, he cannot impair the remaindermen's interest by acquiring title adverse to them; and, therefore, neither he nor his grantees can acquire the fee in the land by adverse possession as against the remaindermen, because they have no right to possession, or to bring suit therefor until the falling in of the life estate. (*Post*, pp. 172, 173.)

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Cases cited and approved: *King v. Sharp*, 6 Humph., 55; *Vaden v. Vaden*, 1 Head, 445; *Carver v. Maxwell*, 110 Tenn., 75, 83.

6. **SAME.** State's second grant can only serve as an assurance of title to be made effective by adverse possession.

The State's grant is of no force to transmit title to land where the State had previously granted the same and has no interest left which it can grant or convey, and its second grant can only serve as an assurance of title to be made effective by seven years' adverse possession thereunder. (*Post*, pp. 170, 171, 173, 174.)

7. **SAME.** Adverse possession, to be effective in perfecting title, must be held under a registered assurance of title.

One does not acquire title to land by adverse possession under the State's second grant not registered in the county in which the land lies, because under our statute (Acts 1895, ch. 38), the adverse possession must be held for seven years under a registered assurance of title. (*Post*, pp. 173, 174.)

Acts cited and construed: Acts 1895, ch. 38.

8. **SAME.** Same. Erroneous registration of grant or deed was immaterial prior to statute requiring registration to make adverse possession effective to perfect title.

Prior to the statute (Acts 1895, ch. 38), requiring the adverse possession to be held for seven years under a registered assurance of title, as a prerequisite to the acquisition of title by seven years' adverse possession thereunder, the registration was not necessary to perfect title by adverse possession under the assurance of title; and, therefore, it was immaterial that the assurance of title was erroneously registered. (*Post*, pp. 173, 174.)

Acts cited and construed: Acts 1895, ch. 38.

Case cited and approved: *Stewart v. Harris*, 2 Swan, 656; *McBee v. Bearden*, 7 Lea, 731, 733.

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- 9. REGISTRATION.** Erroneous in description is immaterial, if sufficient description is registered to identify the land.

A deed as registered is sufficient, though it is erroneously transcribed so as to cause confusion in the boundaries, where the registration contains the description as the land on which Josiah Terry lived, if the place is prominently located, on a public road, and well known. (*Post*, pp. 174, 175.)

Dougherty v. Chestnutt, 86 Tenn., 1; Staub v. Hampton, 117 Tenn., 706, 727.

- 10. SAME.** Purpose of registration, aside from adverse possession, is to give notice and to prevent appropriation by grantor's creditors.

The purpose of registration, aside from that required to make adverse possession effective in perfecting title, is but to give notice to subsequent innocent claimants under the maker of the deed, and to protect the land against appropriation by his creditors. (*Post*, p. 175.)

Code cited and construed: Sec. 3752 (S.); sec. 2890 (M. & V.); sec. 2075 (T. & S. and 1858).

- 11. SAME.** Has no bearing or relation to conflicting titles except as necessary to make deeds evidence.

Registration has no bearing upon, and is unrelated to, a title claimed under another and altogether different line or source, save when the two come into conflict, and the question is whether a particular deed can be introduced in evidence by a plaintiff in ejectment, where objection is made thereto for want of registration. (*Post*, pp. 175, 176.)

Case cited and approved: Wilkins v. McCorkle, 112 Tenn., 688, 699-702.

Cases cited and distinguished: Napier v. Elam, 6 Yerg., 108; Ingram v. Morgan, 4 Humph., 66; Topp v. White, 12 Heisk., 165; Frizzell v. Rundle, 88 Tenn., 396, 398, 399; Embry v. Galbreath, 110 Tenn., 297.

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12. ESTOPPEL. Must be pleaded and proved.

Estoppel by conduct, to be available, must be pleaded and proved.
(*Post*, p. 176.)

13. SAME. Same. Party relying on estoppel must show that he was misled.

The party relying upon estoppel by conduct of the other party must show that he was misled thereby. (*Post*, p. 176.)

14. SAME. None to assert rights by prior failure to do so without knowledge or culpable negligence in acquiring knowledge of them.

One cannot be estopped from asserting his rights because he failed to assert them at some prior time when he had no knowledge of them, unless his failure seasonably to acquire such knowledge was the result of culpable negligence. (*Post*, pp. 176, 177.)

Cases cited and approved: *Morris v. Moore*, 11 Humph., 433; *Moore v. Johnson*, 7 Lea, 580, 583; *Taylor v. Railroad*, 86 Tenn., 228; *Collins v. Williams*, 98 Tenn., 525; *Crabtree v. Bank*, 108 Tenn., 483; *Parkey v. Ramsey*, 111 Tenn., 302, 307.

15. SAME. Defense is ineffective where facts are too indefinite.

The defense of estoppel will not be effective where the facts are too indefinite to permit the defendants to base a solid defense on, as where the defense of estoppel is based upon the alleged fact that the complainants received from their father all of the purchase money obtained by him from the sale of their land inherited from their mother, and the proof failed to show how much of such money was derived from said lands.
(*Post*, p. 177.)

16. INNOCENT PURCHASER. Not as against a prior State grant.

Every one who buys land takes the risk of a grant prior to that on which his title rests; but such grants are public records, and there need never be any real risk if the search for prior grants is prosecuted with thoroughness; and for failure to make such

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exhaustive search, no one can complain and successfully defend under the doctrine of innocent purchaser. (*Post*, p. 178.)

Case cited and approved: *Craig v. Leiper*, 2 Yerg., 193, 196, 197.

17. REGISTRATION. Unregistered but proven deed is good between the parties and may be used in support of a defensive right, but not in support of an offensive right, when.

A deed is good between the parties without acknowledgment or registration, and if it be proved *aliunde*, it may be used as an estoppel against the maker; and prior to the statute (Acts 1895, ch. 38), requiring assurances of title to be registered, to be effective in perfecting title under adverse possession, such unregistered but proven deeds could be used to support or defend an action of ejectment, and since said statute may still be used to support a defensive right under the second section of Acts 1819, ch. 28 (section 4458 of Shannon's Code), but not under the first section (sections 4456 and 4457 of Shannon's Code). (*Post*, pp. 178, 179.)

Acts cited and construed: Acts 1819, ch. 28, secs. 1 and 2; Acts 1895, ch. 38.

Cases cited and approved: *Stewart v. Harris*, 2 Swan, 656; *McBee v. Bearden*, 7 Lea, 731, 733; *Kittel v. Steger*, 121 Tenn., 400.

18. MARRIED WOMEN. Can only convey her lands by deed with privy examination, and not by title bond.

It is well established in this State that a married woman can only convey her lands by deed with privy examination, and cannot convey by her title bond, nor is she estopped by her title bond without refunding the purchase money, except perhaps where it was paid into her own hands. (*Post*, pp. 179, 180.)

Case cited and approved: *Bradshaw v. Van Valkenburg*, 97 Tenn., 316, 323.

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19. **EJECTMENT.** In chancery on condition that purchase money received be charged on the land, when.

The money paid by defendant in purchasing, at judicial sale, the land sought to be recovered in ejectment, and which was distributed among the complainants as if they inherited the land from their father, whereas they inherited it from their mother, together with the interest thereon, was properly charged on the land as a condition to their recovery of the same in ejectment in chancery as the heirs of their mother. (*Post*, p. 180.)

20. **SAME.** Mesne profits to be set off by permanent improvements and taxes paid.

The mesne profits should be set off in ejectment by such amount as the improvements permanently enhanced the value of the land, and by the amount of the taxes paid by the defendant. (*Post*, pp. 180, 181.)

FROM SCOTT.

Appeal from the Chancery Court of Scott County.—
HUGH G. KYLE, Chancellor.

WILL D. WRIGHT, J. W. SCOTT, and W. C. SMITH, for complainants.

E. G. FOSTER, D. C. YOUNG, and R. JONES, for defendants.

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MR. JUSTICE NEIL delivered the opinion of the Court.

This was an ejectment bill filed in the chancery court of Scott county to recover about 250 acres of land. There are numerous defendants who claim through intermediate conveyances from one Richard Smith, the father of the complainants. The latter claim through their mother. The chancellor rendered his decree in favor of the complainants as to some of the defendants, and denied relief as to others; the difference in results as to the respective parties depending upon facts peculiar to the several conveyances. The complainants did not appear from any portion of the decree adverse to them except that part which fixed the beginning corner, and the western boundary line of the 250-acre tract 27 poles and 15 links further eastward than they contended the location should be. Upon this latter subject the complainants appealed and assigned error. All the defendants against whom adverse decrees were rendered appealed and assigned errors.

There are certain questions which affect the rights of all of the complainants and defendants respectively, outside of the boundary question above mentioned. This latter we shall lay wholly out of view until we dispose of the main controversy.

The general questions above referred to relate to the following facts:

On the 20th day of May, 1836, Josiah Terry procured a grant from the State for the 250 acres in controversy. On the 11th day of September, 1860, he conveyed the

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land to Harmon Terry, Miles Terry, Jasper Terry, and Elizabeth Terry, the children of his son Martin Terry. The nominal consideration expressed in this deed was \$500; but it appears that the real consideration was the support and maintenance of Josiah Terry and his wife during the rest of their lives. After a time Martin Terry grew tired of the bargain and desired to remove to some land he owned in a portion of Scott county, called "The Wilderness," a few miles distant from the 250 acres. In order that he might be relieved of the burden, he induced his sister, Rachel Smith, the wife of the above-mentioned Richard Smith, to undertake the care of his father and mother, and, as part of the agreement, to take title to the land. This was agreed to. A deed was made purporting to convey the land to Rachel Smith, and signed by Josiah Terry, Martin Terry, and the children to whom it had been conveyed by Josiah Terry, although the latter were minors. This deed purported to convey an estate in fee. This was in 1862. Rachel Smith and her husband entered upon the land and held possession of it from 1862 to 1891, when Rachel died. Richard Smith continued in possession of the land until his death in 1902. During the lifetime of Richard and Rachel Smith they conveyed parts of the tract, and there is no controversy as to these. After the death of Rachel Smith, her surviving husband, Richard Smith, conveyed the residue of the land to various persons, some of whom still hold the land so conveyed. Other vendees conveyed to other parties still, and these to others. The present holders are the defendants herein.

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The complainants do not insist that the deed which Rachel Smith, obtained, as above stated, conveyed to her any title, but claim that it was good as an assurance of title. It is the theory of complainants that when Rachel Smith and her husband remained upon this land adversely for more than seven years, indeed about eighteen years prior to her death, she acquired title, and that when she died her husband was tenant by the curtesy, and that his subsequent sales were good for his lifetime; that they could not sue his vendees until after his death; that the present suit was brought within seven years after that time; and that therefore no statute of limitations has run against them. Most of the complainants likewise are married women, and were such at and before their mother's death and have so remained since, and they claim that in no event could the statute run against them. There were nine of the children, but only seven of them sued, and the chancellor gave relief only as to a seven-ninths undivided interest.

The general defenses offered as to the whole case may be thus stated:

1. It is insisted that the deed from Josiah Terry and others was not good as an assurance of title because in the body of the deed Martin Terry, the father of four of the vendors, purported to act as their agent when the evidence shows that, although the fact did not appear on the face of the deed, they were minors and could constitute no one their agent for such purpose; also, that the deed purports to have been signed and acknowledged by the children in person, when the evidence, now offered,

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shows that neither of them could read or write, and they were so young they could not have intelligently acknowledged the instrument. From these facts it is argued that the deed was fraudulent as to the minors, and so known to Rachel Smith at the time of its execution, and therefore the statute of limitations could not run in her favor or in favor of her heirs at law, citing *Waterhouse v. Martin*, Peck, 392, 409. Although the facts are as above indicated, and the deed was void as to the minors, yet it purported on its face to convey an estate in fee, and was an assurance of title. Therefore, the statute would run, since the law is that if the instrument purports to convey an estate in fee, and adverse possession be taken and held thereunder, the statute of limitations will run in favor of such possession, even though the deed be in fact void. *Vance v. Johnson*, 10 Humph, 214; *Clark v. Chase*, 5 Sneed, 636; *Thurston v. University*, 4 Lea, 513, and cases cited; *Nelson v. Trigg*, 4 Lea, 701, and cases cited; *Hubbard v. Godfrey*, 100 Tenn., 150, 57 S. W., 81. This is true even though the deed be forged. *Clark v. Chase*, supra. The case of *Waterhouse v. Martin* has been overruled, on the point referred to, by subsequent cases. *Love v. Shields*, 3 Yerg., 408 (involving a void tax deed, known to be void by the conveyee at the time he took it); *Goodloe v. Pope*, 3 Shan. Cas., 634 (a champertous deed); *Gray v. Darby*, Mart. & Y., 396; *Blantire v. Whitaker*, 11 Humph., 313, 317, 318; *Clark v. Chase*, supra; *Hunter v. O'Neal*, 4 Baxt., 494; *Ramsey v. Quillen*, 5 Lea, 184; *McBee v. Bearden*, 7 Lea, 731; *Boro v. Hidell*, 122 Tenn., 80, 99, 120 S. W.,

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961, 135 Am. St. Rep., 857—all involving cases of fraudulent conveyances. In *Love v. Shields*, the case of *Waterhouse v. Martin* was referred to by book and page, although the style was not given. The rule stated in *Love v. Shields*, *Clark v. Chase*, and other cases is that the statute made no such exception, and the court should not and could not make it. What has been stated upon the law point is sufficient; but we add that we do not believe Rachel Smith was consciously guilty of any fraud. We are convinced that she and the family, including her father, brother, and husband believed they were making a lawful substitution of Rachel for her brother Martin in the care of the old people, and that by the deed she was but receiving reasonable compensation for the anticipated service. The purpose of the adults was to effect a rescission of the former deed and the substitution of a new party to the contract, the sister for the brother. They dealt with the rights of the minors, it is true, in a manner unwarranted by law, and the latter could have recovered the land if they had sued in time. The youngest is now, however, more than fifty years old, and the statute of limitations has long since run as to them.

2. In order to state the next defense it is necessary to recite a fact not previously mentioned. On the 17th day of June, 1867, Richard Smith procured from the State a grant for 600 acres of land which the defendants claim entirely covers the 250 acres. They insist that from the date of that grant the possession of Richard Smith was for himself, and not in right of his wife; also, that under

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the constitution of 1870, Sched. 4, the running of the statute was suspended from May 6, 1861, to January 1, 1867, and this time could not be counted; that, leaving out this period, there was only that from January 1, 1867, to June 16, 1867, for the statute to run in favor of Rachel Smith; and that on the latter date it began to run in favor of Richard Smith under his 600-acre grant. Hence there was only six months and sixteen days of adverse possession in favor of Rachel Smith. Conceding that the statute did not begin to operate until January 1, 1867, although Rachel and Richard Smith went into possession in 1862, its running would not be stopped by Richard Smith's procurement of the grant of June 16, 1867, in his own name. When the title, or assurance of title, is in the wife, the joint possession of the husband and wife inures to the benefit of the wife. *Templeton v. Twitty*, 88 Tenn., 595, 14 S. W., 435; *Woodruff v. Roysden*, 105 Tenn., 491, 58 S. W., 1066, 80 Am. St. Rep., 905.

The legal presumption is that the possession is with the legal title. *Welcker v. Staples*, 88 Tenn., 49, 51, 12 S. W., 340, 17 Am. St. Rep., 869; *McLemore v. Durivage*, 92 Tenn., 482, 492, 22 S. W., 207; *Foster v. Jordan*, 2 Swan, 476, 480, 481. It can make no difference that the husband is the head of the family, claims the property as his own, and apparently controls it as such; if the wife reside with him, and the title is in her, the law adjudges the possession to be hers. *Fancher v. De Montegre*, 1 Head, 40, 41. The husband could not change this *status* by procuring, pending such joint occupation, a

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conveyance to himself, since the wife is not bound to choose between her husband and her land. *Ramsey v. Quillen*, 5 Lea, 184, 192. At the time Richard Smith received the 600-acre grant from the State, the latter had no title to so much as covered the 250 acres, having previously granted that to Josiah Terry; therefore the only possible effect of that action, so far as concerned the 250 acres, if it had any effect at all, would have been an endeavor to place himself in the position of claiming adversely to his wife while occupying the land with her, and while she was living in the house with him as his wife. This would have been absurd. The law would not tolerate such a *status*; certainly would not presume its existence. The husband cannot so rid himself of the presumption of law in favor of the wife's possession when with her he enters upon land conveyed to her. That presumption remains so long as they occupy the land as husband and wife, and the conveyance to her remains unchanged.

Therefore, the husband and wife having remained upon the land for more than seven successive years from January 1, 1867, indeed until her death February 2, 1891, the title became vested in her under the statute of limitations (Sh. Code, section 4456); and upon her death descended to her children, or descendents of such, as her heirs at law, subject, however, to her husband's tenancy by the curtesy. *Templeton v. Twitty*, *supra*.

3. But it is next said that by Richard Smith's occupancy of the land subsequent to his wife's death, and the occupancy of those claiming under him, and to whom he

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sold, for more than seven years, the heirs of the wife were divested of the title; that is, that such occupancy was adverse, and under the 600-acre grant, from the death of the wife. There is nothing to show that Richard Smith assumed this adverse relation to his children, immediately upon the death of his wife. His legal relation was that of tenant by the curtesy—that is, a life tenant—and hence a trustee, or *quasi* trustee at least, for the remaindermen. *Vaden v. Vaden*, 1 Head, 445; *King v. Sharp*, 6 Humph., 55. He could do nothing to impair the remainderman's interest, as by acquiring a title adverse to that interest. 16 Cyc. (Tit. Estates), 617. If he could not effect such acquisition by direct purchase, it is certain he could not do so by adverse possession. Indeed, the possession of the life tenant is not adverse but in harmony with the rights of the remainderman, since the latter do not ripen into a right of possession until the falling in of the life estate; meantime the life tenant holds for the protection of the fee as well as of his own estate. We conclude therefore that Richard Smith conveyed to his vendees or donees, as the case may be, only his life estate, which he of course had the right to do, and that the possession of his conveyees could not be adverse to the heirs of Rachel Smith, his wife, during the pendency of the life estate, since they had no right to possession, or to bring suit therefor until the falling in of the life estate. *Carver v. Maxwell*, 110 Tenn., 75, 83, 71 S. W., 752.

In addition to the foregoing, it is clear no title could, in any event, have been acquired by Richard Smith

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through adverse possession under his 600-acre grant, because the grant was not registered in Scott county pursuant to chapter 38, Acts of 1895; his assumed adverse possession not beginning until the death of his wife, February 2, 1891, therefore not having attained to the statutory requirement of seven years, prior to the time the act was passed. The grant itself was of no force to transmit title to the land in controversy because the State had previously granted the same land to Josiah Terry and had no interest left which it could grant or convey. Its new grant thereafter could only serve as an assurance of title, to be made effective by seven years' adverse possession thereunder, as the deed of any private person, and like such deed required to be registered in the county where the land lay. This is in accordance with the very terms of the Acts of 1895, ch. 38. This act declared that no title should be vested by virtue of adverse possession unless the "conveyance, devise, *grant*, or other assurance of title" under which such possession was claimed, should have been registered for the full term of seven years in the county.

4. The point is made that Rachel Smith acquired no title by adverse possession under the deed made to her by Josiah Terry, Martin Terry, and the children of the latter on the 14th day of April, 1862, because that deed, as registered in 1865, owing to the confusion of boundaries, in transcribing the deed upon the books of the county register, purported, so far as the calls were concerned, to convey only one small corner of the land really covered by the original. But prior to the act of 1895

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above referred to registration of an assurance of title was not required as a prerequisite to the acquisition of title by seven years' adverse possession thereunder. *Stewart v. Harris*, 2 Swan, 656; *McBee v. Bearden*, 7 Lea, 731, 733. Rachel Smith's title was perfected by seven year's adverse possession long prior to 1895. However, the deed, even as registered, also described the land as that on which Josiah Terry lived. This would have been sufficient, because the place was prominently located, on a public road, and well known. *Dougherty v. Chestnutt*, 86 Tenn., 1, 5 S. W., 444; *Staub v. Hampton*, 117 Tenn., 706, 726, 101 S. W., 776. But, aside from all of the forgoing considerations, it is only necessary to say that the purpose of registration, aside from the act of 1895, supra, is but to give notice to subsequent innocent claimants under the maker of the deed, and to protect the land against appropriation by his creditors. Shan. Code, section 3752. It has no bearing upon, and is unrelated to, a title claimed under another and altogether different line or source, save when the two come into conflict, and the question is whether a particular deed can be introduced in evidence by a plaintiff in ejectment; objection being made thereto for want of registration. See the cases upon this subject referred to and discussed in *Wilkins v. McCorkle*, 112 Tenn., 688, 699-702, 80 S. W., 834. Of course, what has just been said has no bearing upon controversies such as were the subject of the opinions in *Topp v. White*, 12 Heisk., 165; *Napier v. Elam*, 6 Yerg., 108; *Ingram v. Morgan*, 4 Humph., 66, 40 Am. Dec., 626; *Frizzell v. Rundle & Co.*,

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88 Tenn., 396, 398, 399, 12 S. W., 918, 17 Am. St. Rep., 908; and *Embry v. Galbreath*, 110 Tenn., 297, 75 S. W., 1016.

5. It is urged that the heirs of Rachel Smith are estopped by her conduct in permitting her husband to use the land as his own. No such estoppel is pleaded in the answers, and there is no evidence that the defendants, or any one under whom they claim, were misled by any act done by Richard Smith during his wife's life. So there is neither pleading nor evidence on which to base the point. In deed, all of the conveyances under which defendants claim were made after the death of his wife.

6. It is insisted that the complainants are estopped because they stood by for years and saw the defendants expend money in improvements on the lands without making known or bringing forward their claims. Complainants meet this fully by showing that they had no knowledge of their mother's title until about one year before the present suit was brought, and only discovered it then by looking through the old papers of their father's estate which had since their father's death been chiefly in the hands of his son, defendant E. W. Smith, and after the latter had removed to a distant State. One cannot be estopped from a present assertion of his rights because he failed to assert them at some prior time when he had no knowledge of them, unless his failure to seasonably acquire such knowledge was the result of culpable negligence. *Morris v. Moore*, 11 Humph., 433; *Moore v. Johnson*, 7 Lea, 580, 583; *Taylor v. Nashville, etc., R. Co.*, 86 Tenn., 228, 6 S. W., 393; *Collins v. Wil-*

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liams, 98 Tenn., 525, 41 S. W., 1056; *Crabtree v. Bank*, 108 Tenn., 483, 67 S. W., 797; *Parkey v. Ramsey*, 111 Tenn., 302, 307, 76 S. W., 812; 2 Pom. Eq. Jur. section 807; Bigelow on Estoppel, 480.

7. The defendants base an estoppel on the alleged fact that the complainants received from their father all of the purchase money which he obtained from the sale of the lands after the death of their mother. It is in proof that soon after the death of Rachel Smith he divided among her children \$500, which he said was their mother's money; but the record does not show from what source she obtained it, nor, otherwise than by his own statement, how he came by it. Some years afterwards he divided about \$2,000 among his children. It may be inferred from Richard Smith's frugal habits that some of this fund consisted of money he had received from sales of the land; but the record is indefinite as to how much he received from that source, and how much from other sources, consisting of other lands he dealt in, and, as to so much as may have come from the land in question here, there is no means of telling how much should be credited to his life estate, and how much to the fee in the land. In short, the facts are too indefinite to permit the defendants to base a solid defense on.

8. The defendants finally say they are innocent purchasers, and for that reason should not be disturbed. The defense is not applicable to a controversy of the kind before us. Here we have no secret equities which the complainants are endeavoring to assert against the legal

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title, nor any fraud or oppression the effects of which they are seeking to escape, but only a contest for superiority between two conflicting chains of title, each of which must eventually rest upon a grant from this State. Every one who buys land takes the risk of a grant prior to that on which his title rests. But grants are public records, and there need never be any real risk if the search for prior grants is prosecuted with thoroughness. On failure to make such exhaustive search, no one can complain and successfully defend under the doctrine of innocent purchaser. *Craig v. Leiper*, 2 Yerg., 193, 196, 197, 24 Am. Dec., 479.

9. A deed was offered in the court below purporting to have been made by one of the complainants, Savannah Litton, to Mary S. Burchfield for three acres of the land. This deed was objected to because the certificate thereto was void. It was undoubtedly void, and there was no error in this action of the chancellor. It is urged, however, that the deed was good between Mrs. Litten (a widow) and Mrs. Burchfield without acknowledgment or registration. Such deeds are good between the parties, and as to them may be proven, even though no certificate of acknowledgment is attached thereto, and might be used to support or defend an action of ejectment (*Stewart v. Harris*, 2 Swan, 656; *McBee v. Bearden*, 7 Lea, 731, 733), prior to Acts of 1895, ch. 38, and may still be used to support a defensive right under the second section of the Acts of 1819, ch. 28, but not under the first section (*Kittel v. Steger*, 121 Tenn., 400, 117 S. W., 500). The deed referred to purported to have been

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executed in 1904, and hence fell within the Acts of 1895, ch. 38, and could not in any event be used to support title under the first section of the act of 1819. Being good, however, between the parties to it, it might have been used as an estoppel against the claim of Mrs. Litton, if it had been proven *aliunde*; but there was no such evidence offered. Mrs. Litton does admit in her deposition that she "sold" the three acres to Mrs. Burchfield, but she was not asked whether she executed the deed offered, and there is no testimony on the point. The chancellor therefore did not err in excluding the paper offered.

10. In 1888 Richard Smith and his wife, Rachel, executed a title bond to Alvis Litton, the husband of Savannah Litton, for a portion of the land in controversy, which was to be paid for in certain installments. Alvis Litton paid \$50 and a yoke of oxen, which covered only a small part of the consideration mentioned in the deed. After his death, and after the death of Rachel Smith, her surviving husband, Richard, made a deed of this land to his daughter Savannah Litton, which she testifies was without consideration, in fact was a gift, and was not made in compliance with the title bond. It is insisted for defendants that Rachel Smith was estopped by the execution of this bond, and her heirs through her. The rule in this State that a married woman can convey her lands only by deed with privy examination is so well established that no authorities need be cited to support it. Whether Rachel Smith would have been estopped to claim the land, without refunding the consideration, if the evidence showed it had been paid into her own

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hands (*Bradshaw v. Van Valkenburg*, 97 Tenn., 316, 323, 37 S. W., 88), we need not stop to consider, since there is no evidence of that kind in this record.

11. It is insisted that as the deed made by Richard Smith purported to convey an estate in fee to the 75 acres therein described, to Mrs. Litton, and the persons to whom she conveyed that land, in various parts, had held adversely for more than seven years, their title was perfected. The chancellor held that Savannah Litton could not recover against any of the persons to whom she had made deeds, but permitted the other complainants to recover their undivided interests. There was no error in this. As said in an earlier paragraph of this opinion, Richard Smith had a life estate in the land, and his deed conveyed, in legal effect, only this to Savannah Litton, and pending that life estate the statute would not run against the complainants who were remaindermen. *Carver v. Maxwell*, supra.

12. Defendant Nick Stanly purchased a part of the land in controversy at a chancery sale, under a decree on a bill filed by J. T. and E. W. Smith, administrators of Richard Smith, to enforce the vendor's lien, for purchase money supposed to be due Richard Smith's estate on a sale made by him to another person. The amount received by the estate was \$300, and this was distributed among the complainants and other children of Richard Smith as his distributees before it was known their mother owned the land. The chancellor, as a condition of the recovery, charged the land with the \$300 and interest, and ordered an account to ascertain mesne profits,

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which he decreed should be offset by such amount as the evidence should show any improvements made had permanently enhanced the value of the land, and also by the amount of taxes paid by Stanly. This was a correct decree.

The foregoing disposes of all of the errors assigned by the defendants. The complainants assigned error only upon the action of the chancellor in fixing the western boundary of the tract. This assignment presents a question of fact. We have fully considered it in the light of the record and briefs, and find that the chancellor reached the correct result.

Decree affirmed.

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JOHN WALKER LEACH *et al.* v. VIRGINIA SWEPSON
COWAN *et al.*

(*Knoxville*. September Term, 1911.)

1. **ADMINISTRATION.** Executors are entitled to reasonable compensation under statute.

Under the express provisions of statute (section 4037 of Shannon's Code), executors are entitled to reasonable compensation. (*Post*, p. 195.)

Code cited and construed: Sec. 4037 (S.); sec. 3142 (M. & V.); sec. 2301 (T. & S. and 1858).

2. **TRUSTS AND TRUSTEES.** Trustees under wills are entitled to compensation without statute.

Trustees under wills are entitled to compensation in this State, though at common law trustees were not entitled to compensation for their services, and no statute giving trustees under wills compensation has been enacted. (*Post*, pp. 195-198.)

Cases cited and approved: *Coffee v. Ruffin*, 4 Cold., 524; *Daniel v. Fain*, 5 Lea, 258; *Vaccaro v. Cicalla*, 89 Tenn., 70; *Barney v. Saunders*, 16 How., 541.

3. **WILLS.** Bequests of "net income" of residuary fund does not charge the expenses of the administration and trust upon such income, when.

Where the testator gave certain sums of money in trust, the income of which was to be paid to certain legatees during life, and then devised and bequeathed all the rest and residue of his estate in trust, "the *net* rents, interest, or income" of which was to be paid to his three nieces named, in certain portions, and upon their death, to their respective children during their lives; and appointed two of the said nieces, to whom the bulk of the estate was given, and a nephew, to whom a comparatively small sum was given, joint executors and trustees

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under the will, with a provision for the appointment of their successors, but without any express provision for compensation, it is *held* that the word "net," used to qualify the "rents, interest, or income" payable to the said residuary legatees, if not inadvertent, does not show any intention on the part of the testator to impose upon the income thus given to them the burden of bearing all the expenses of the trust, including the compensation of the executors and trustees. (*Post*, pp. 188-193, 198-201.)

4. TRUSTS AND TRUSTEES. Testamentary trustees are entitled to compensation, though a bookkeeper performs the clerical work, and an attorney performs legal services.

Where the executors and testamentary trustees have given careful, diligent, and intelligent attention to the trust, and have borne the responsibility and burden of management devolved upon them, they are entitled to compensation, although many of their duties were performed by an attorney and a bookkeeper, where the bookkeeper did only clerical work, and where nothing was left for the attorney except what was usual under such circumstances. (*Post*, p. 201.)

5. SAME. Compensation of \$3,600 per annum for management of a \$750,000 trust, with a \$50,000 income, is reasonable, when.

Where a complicated testamentary trust, amounting to about seven hundred and fifty thousand dollars, with an annual income of about fifty thousand dollars, is carefully, diligently, and ably administered and managed by the executors and testamentary trustees, an allowance of thirty-six hundred dollars per annum, made as compensation for three trustees collectively, is reasonable. (*Post*, pp. 202, 203.)

6. ADMINISTRATION. Settlements are *prima facie* correct, even as to amount of compensation allowed, when.

Settlements by executors, made in the county court after notice to all the parties, who were present in the person of their attorney and guardian, are *prima facie* evidence of their correctness, even as to amount of compensation allowed the executors,

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and can only be attacked by a bill to surcharge and falsify the accounts. (*Post*, p. 203.)

Case cited and approved: *Matlock v. Rice*, 6 Heisk., 33, 38.

7. TRUSTS AND TRUSTEES. Question as to jurisdiction of county court to pass their accounts is reserved.

The question whether the county court has jurisdiction to pass the accounts of testamentary trustees in cases other than upon the death, resignation, or removal of an old trustee and the appointment of a new one is reserved, and not determined, because it is not necessary to consider the question in a case where the evidence satisfies the court that the allowance of compensation to such trustees, made by the county court settlement, was proper. (*Post*, pp. 203, 204.)

Code cited and construed: Secs. 3529, 3530, 5414 *et seq.*, 6031, 6070 (S.); secs. 2737, 2738, 4393 *et seq.*, 4982, 5004 (M. & V.); secs. 1979, 1980, 3648 *et seq.*, 4204, 4232 (T. & S. and 1858).

8. SETTLEMENTS IN COUNTY COURT. May be questioned by general bill, when; and can be questioned only by bill to surcharge and falsify, when; how infants are affected by.

Settlements in the county court in the usual course, without notice, while *prima facie* correct, may be questioned by a general bill without the necessity of surcharging and falsifying the accounts; but if notice is given, and, for a stronger reason, if the parties attend, there must be a bill to surcharge and falsify the account before it can be questioned. Infants who do not attend, by their guardian, the settlements in which they are interested, although notified, may question such settlements by general bill; but, if they attend by their guardians, they can only question such settlements by a bill to surcharge and falsify the account. (*Post*, pp. 205, 206.)

Cases cited and approved: *Turney v. Williams*, 7 Yerg., 172; *Elrod v. Lancaster*, 2 Head, 575; *Milly v. Harrison*, 7 Cold., 213; *Shields v. Alsup*, 5 Lea, 513; *Cannon v. Apperson*, 14 Lea, 581; *Murray v. Luna*, 86 Tenn., 332; *Alvis v. Oglesby*, 87 Tenn., 183; *Evertson v. Tappen*, 5 John. Chy. (N. Y.), 497, 511.

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9. **TRUSTS AND TRUSTEES.** Claim allowed in county court settlement, after full investigation by those adversely affected and represented, will not be stricken out, when.

Where one of the testamentary trustees presented a claim against the trust estate, which, before it was allowed in the county court settlement, was fully investigated by the other two testamentary trustees, who were very adversely affected by its allowance, and all parties in interest and adversely affected thereby were represented, and there was no fraud, and no new evidence was produced, the claim cannot be stricken out of the account, even under a bill to surcharge and falsify. (*Post*, pp. 204-206.)

10. **SETTLEMENTS IN COUNTY COURT.** Instance of bill to "surcharge and falsify."

A bill against testamentary trustees, charging mismanagement and seeking to hold them liable on various claims, complaining of the compensation allowed them and especially of an item paid on settlement of a claim of one of the trustees against the estate, is a bill to "surcharge and falsify" the account or settlement in the county court. (*Post*, p. 206.)

11. **PAYMENT.** Recovery of money paid or property conveyed under mistake of law, when and when not.

Money paid or property conveyed under a mistake of law may be recovered, where it would be unconscionable for the party who obtains the advantage in such transaction to retain it; but though there was a clear mistake of law, yet if the party benefited may retain the advantage in good conscience, neither the chancery court, nor a court of law will give relief. (*Post*, pp. 206, 207.)

Cases cited and approved: *Drew v. Clarke*, Cooke, 374, 380; *Trigg v. Read*, 5 Humph., 529, 532-535; *Sparks v. White*, 7 Humph., 86, 90; *Farnsworth v. Dinsmore*, 2 Swan, 38, 42; *King v. Doolittle*, 1 Head, 78, 84-88; *Dalton v. Wolfe*, 11 Heisk., 498, 502; *Warren v. Williamson*, 8 Bax., 427, 431; *Spurlock v. Brown*, 91 Tenn., 241, 261; *Northrop v. Graves*, 19 Conn., 548; *Baker v. Massey*, 50 Iowa, 399, 403.

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12. **SAME. Same. No recovery of claim of one executor and testamentary trustee allowed and paid after full investigation and representation of all the parties, when.**

Where one of the three executors and testamentary trustees presented a claim against the testator's estate, evidenced by a check given to him by the testator (an uncle) as a marriage present, and was again taken possession of by the testator only to preserve it, and such claim was allowed and paid, after full investigation and representation of all the parties, the beneficiaries of the estate adversely affected thereby, and subsequently objecting to the item, stand in the attitude of one who has made a voluntary payment of money, with knowledge of all the facts, and a court of equity will not grant relief, since said trustee can retain the money with a good conscience. (*Post*, pp. 207, 208.)

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
HENRY HUDSON, Special Chancellor.

WEBB & BAKER, for complainants.

SHIELDS, CATES & MOUNTCASTLE, and R. H. SANSOM,
for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

Robert Redd Swepson died on the 23d of March, 1902. Prior to that date, that is, on the 30th of November, 1901, he made and published his last will and testament, which was as follows:

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"I, Robert Redd Swepson, of Knox county, State of Tennessee, being of sound mind and disposing, memory, do make, declare and publish this, my last will and testament, hereby revoking all other wills heretofore made by me.

"1st. I hereby direct that my executor and executrices, hereinafter appointed, pay, as soon after my death as possible, all of my just debts, which are few.

"2nd. It is my will and I hereby direct my executor and executrices to proceed as rapidly as possible to close up all of my unsettled business and collect in all moneys due and owing to me by bond, bill, note, account, or in any other manner whatsoever and forthwith pay my debts, and place my estate in condition to be transferred to themselves as trustees, as hereinafter provided.

"3rd. I hereby give and bequeath to my cousin, John S. Field, Sr., of Virginia, as a mark of my esteem, the interest upon the sum of two thousand (\$2,000) dollars, the same to be paid over to him for and during his natural life, the principal sum to be held and controlled by the trustees hereinafter appointed, and, upon the death of said John S. Field, the same to become part of my estate and pass under the residuary clause of this will.

"4th. It is my will and I hereby give and bequeath to my niece, Marian Hepburn Dodson, for the term of her natural life, and to her sole and separate use, free from the marital rights of any husband she may have, the sum of ten thousand (\$10,000) dollars, the same to be invested, held and controlled by the trustees hereinafter

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appointed, so as to preserve intact the principal, paying over to said niece the interest or income thereof so long as she lives.

“Upon her death said principal shall be and become a part of the trust estate created under the seventh clause or section of this will, and pass under said clause.

“5th. I hereby give and bequeath to my nephew, Ebenezer Hepburn Saunders, during his natural life, the full sum of twenty thousand (\$20,000) dollars, the same to be invested, held and controlled by the trustees hereinafter appointed, so as to preserve intact the principal sum, said trustees paying over to my said nephew so long as he lives the interest or income thereof. Upon the death of my said nephew, said principal sum shall be paid over to his lawful issue, share and share alike, *per stirpes*.

“Should he die leaving surviving no child or children, or descendants of children, then said principal sum shall become a part of the trust estate created under the residuary clause of this will and pass under said clause.

“6th. I hereby give and bequeath to the children of my niece, Mary C. Leach, for and during their natural lives, the following sums:

“To John Walker Leach and Ann Swepson Leach, each the sum of twenty-five thousand (\$25,000) dollars.

“To Robert Swepson Leach, the sum of seventy-five thousand (\$75,000) dollars.

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“Said respective sums to be invested, held and controlled by the trustees hereinafter appointed so as to preserve intact the principal sums, said trustees paying over to said three legatees, or to their guardian, if minors, the interest or income accruing on said respective sums, so long as each shall live.

“Upon the death of each, the principal sum upon which each is hereby given the interest shall be paid over to the lawful issue of each, share and share alike, *per stirpes*.

“Should either die leaving no lawful issue, then said principal shall go to the children of the other two legatees provided for under this clause, share and share alike, *per stirpes*, or in the event only one has children, then to such children share and share alike.

“Should all three of these legatees die, leaving no children nor lawful issue of children surviving, then upon the death of the last one, the said principal sums shall be paid over to the children or descendants of children of my nieces, Virginia Swepson Cowan and Lillian Swepson Spilman, share and share alike, *per stirpes*.

“7th. I hereby give, devise and bequeath all of the rest and residue of my estate of every nature, kind and character and description whatsoever and wherever situated to my executor and executrixes hereinafter appointed, as joint trustees to receive, hold, control and manage upon the following uses and trusts:

“The net rents, interest or income of this trust estate shall be paid semiannually to my three nieces— Virginia Swepson Cowan, widow of James D. Cowan, dec'd, Lil-

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lian Swepson Spilman and Mary C. Leach, in the following proportions:

"To said Virginia Swepson Cowan, forty (40) per cent. of said net income.

"To said Lillian Swepson Spilman forty (40) per cent. of said net income.

"To said Mary C. Leach, twenty (20) per cent. of said net income.

"Said net income herein given to each of my said three nieces is given to the sole and separate use of each, free from the control and marital right of any husband either of them may ever have, and shall be paid over to each upon her individual receipts so long as each lives.

"Upon the death of said Virginia Swepson Cowan, the rents, interest or income of this 40 per cent. of the estate shall be paid over to her two children Robert Swepson Cowan and Jeannette Cowan and to any future children she may have, share and share alike, so long as either of said children, Robert Swepson Cowan or Jeannette Cowan is living.

"Upon the death of my said niece, Virginia Swepson Cowan and of both of her said children, Robert S. and Jeanette Cowan, the trust as to this part of my estate terminates, and this part of the principal shall go absolutely in fee to the then living children or lawful issue of children of my said niece, Virginia Swepson Cowan, share and share alike, *per stirpes*, and should there then be no living children nor issue of children of said Virginia Swepson Cowan, said principal shall go absolutely to the children, or issue of children of my other two

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nieces, Lillian Swepson Spilman and Mary O. Leach, share and share alike, *per stirpes*.

“Upon the death of said Lillian Swepson Spilman the rents, interest or income of this 40 per cent. of the estate shall be paid over to her two children, Robert Redd Spilman and Lillian Spilman and to any future children she may have, share and share alike, so long as either of said children. Robert Redd Spilman or Lillian Spilman, is living.

“Upon the death of my niece, Lillian Swepson Spilman, and of both of her said children, said Robert Redd and Lillian Spilman then the trust as to this part of my estate shall terminate, and this part of the principal shall go absolutely in fee to the then living children or lawful issue of children of my said niece, Lillian Swepson Spilman, share and share alike, *per stirpes*, and should there be no living children nor issue of children of said Lillian Swepson Spilman, said principal shall go absolutely to the children or issue of children of my other two nieces, Virginia Swepson Cowan and Mary C. McCreary, share and share alike, *per stirpes*.

“Upon the death of my said niece, Mary C. Leach, the rents, interest or income of this 20 per cent. of the estate shall be paid over to her three children, John Walker Leach, Ann Swepson Leach, and Robert Swepson Leach, and to any future children she may have, share and share alike, so long as either of said three children, John Walker, Ann Swepson and Robert S. Leach, is living.

“Upon the death of my said niece, Mary C. Leach, and of her three children, John W., Ann S., and Robert S.

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Leach, the trust as to this part of my estate shall terminate, and this part of the principal shall go absolutely in fee to the then living or lawful issue of children of my said niece Mary C. Leach, share and share alike, *per stirpes*, and should there then be no living children nor issue of children of said Mary C. Leach, said principal shall go absolutely to the children or issue of children of my other two nieces, Virginia Swepson Cowan and Lillian Swepson Spilman, share and share alike, *per stirpes*.

“All legacies or devises, whether of a life estate or remainder, given under this ‘seventh’ clause or section of this my will to any of my grandnieces or their female issue are intended to be given, and are given to their sole and separate uses, as technical separate estate, free from the control or marital rights of any husbands they may ever have.

“8th. I hereby give express power and authority to the trustees hereinafter appointed, and to their successors in trust, to sell for the purpose of reinvestment, or for division, all or any part of the bonds, stock or real estate belonging to my estate, and in case of real estate to make proper deeds therefor, the purchasers not to be bound to see to the application of the proceeds, but all of the then trustees shall concur and consent to such sales.

“Upon the death, failure, or refusal to qualify, incapacity to act, or resignation of either of the trustees hereinafter appointed, or of their successors in trust, appointed as herein provided, then in either of said events

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the two trustees shall forthwith appoint, by a written instrument duly entered upon the court records of the county court of Knox county, Tenn., another trustee in the room and place of the trustee failing or refusing to qualify, incapable of acting, dying, or resigning, and such trustee so appointed from time to time shall have and be clothed with all the rights, powers and duties herein granted to and devolved upon all of those appointed herein, and all acts done by such shall have the same force and effect as if done by those herein appointed, and said trustee shall not be required to give bonds as such.

“9th. I hereby nominate, constitute, and appoint my nieces, Virginia Swepson Cowan and Lillian Swepson Spilman, and my nephew, Ebenezer Hepburn Saunders, the executrixes and executor, and joint trustees of and under this, my last will, and hereby expressly excuse and release each and all of them, and each and all of their successors, duly appointed as hereinbefore provided, from giving bonds either as executors or as trustees, having full confidence in those hereby appointed, and in those that may be appointed under the terms of this will.

“In testimony whereof, I, the said Robert Redd Swepson, testator, have hereunto set my hand and seal, at Knoxville, Tenn., this 30th day of November, 1901.

“ROBERT REDD SWEPSON. [Seal.]”

In this will the defendants, Mrs. Virginia S. Cowan, Mrs. Lillian S. Spilman, and Mr. E. Hepburn Saunders,

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were made executors and testamentary trustees, as appears from the ninth clause.

On June 24, 1904, the executors made their first settlement in the county court of Knox county, and on August 7, 1907, they made their final settlement, as executors, accounting for all moneys that had come into their hands. A decree was entered in the county court, confirming this final report, and discharging the executors from all further liability. Between the time of their qualification as executors and the date of their final discharge as such executors, they transferred large amounts of property to themselves as trustees under the will, and made sundry settlements as trustees in the county court. After their final settlement as executors, they dealt with the estate only as testamentary trustees.

The present bill was filed on the 5th of December, 1910, by John Walker Leach in his own right, Anne Swepson Leach and Robert Swepson Leach (minor children of Mrs. Mary C. McCreary, formerly Mrs. Mary C. Leach), suing by their guardian, the said Mrs. Mary C. McCreary; also Mary Elizabeth McCreary (minor child of Mrs. Mary C. McCreary), suing by her next friend, W. L. McCreary, and W. L. McCreary and his wife, Mrs. Mary C. McCreary, against the executors above mentioned, and the two children of Mrs. Cowan, Robert Swepson Cowan and Jeannette Cowan, and the husband of Mrs. Spilman and her four minor children, Robert Redd Spilman, Lillian Spilman, Sam Taylor Spilman, Martha Spilman, and also against Marian Hepburn Dodson.

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The bill made many charges of mismanagement, etc., against the executors and trustees, seeking to hold them liable for various alleged shortcomings. The case was tried in the chancery court of Knox county, and the bill was dismissed. From this decree the complainants have appealed to this court, and have here assigned errors.

Of the various points alleged in the bill there remain for examination only the special matters now brought forward in the assignment of errors.

The first error assigned complains of the compensation allowed the executors and trustees; the second, of an item of \$12,000 paid on the settlement of a claim of E. H. Saunders against the estate.

1. As to compensation.

The first contention under this head is that the executors and trustees, who are the same persons, are all appointed in the will, and all take an individual interest under the will; that the will makes no provision for compensation, and they accepted the trusts imposed by the will without any contract therefor; that under the common law trustees were not entitled to compensation, and there is no statute in Tennessee changing that rule as to any other except trustees under assignments in trust for creditors.

As to the compensation of the executors as such, this is settled by statute. It is provided in Shannon's Code, section 4037, that on settlement the executors shall be credited with a reasonable compensation, and such has been the universal rule applied upon this subject in this State.

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As to trustees' compensation, it is true the common-law rule was as stated, and we know of no statute in Tennessee that directly affects the question. However, it has been the custom to allow such compensation in this State, and the validity of this rule or custom has been recognized in this State in the cases of *Coffee v. Ruffin*, 4 Cold., 524, *Daniel v. Fain*, 5 Lea, 258, and *Vaccaro v. Cicalla*, 89 Tenn., 70, 14 S. W. 43. Authorities elsewhere indicate that the English common-law rule has not been uniformly adopted in this country. In the American & English Encyclopedia of Law (2d Ed.), vol. 28, pp. 1032 and 1033, it is said:

"It is a fundamental principle of the English courts that trustees are not to be permitted to derive personal profit from the performance of the duties of the trust, and hence no compensation is allowed to them for personal services in the performance of their official duties, though involving personal trouble and loss of time, unless such compensation is provided for in the trust instrument, or by special contract. But even in England the trustee is allowed indemnity for all necessary expenses, including losses and charges. The effect is much the same as if compensation was granted to him."

"Although formerly this doctrine was, and at the present time is, in the absence of statutes, followed in some States, yet now in America and Canada, generally, a trustee, in the absence of any agreement or stipulation therefor, is allowed compensation by the court, where he has faithfully discharged his duties."

On page 1035 of the same book it is said:

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“Where there is no express contract regulating the compensation of trustees, the power of the court to refuse or allow compensation to trustees, or, if commissions are granted, to grade the amount allowed according to their discretion or judgment, as they may deem equitable in each particular case, is in all cases absolute.”

In *Barney v. Saunders*, 16 How., 541, 14 L. Ed., 1050, it was said by the supreme court of the United States:

“The third exception is that the trustees should not have been allowed and credited by 5 per cent. on the principal of the personal estate, and 10 per cent. on the income, as was done by the auditor, and they should not be allowed any commission at all, either upon the principal or income of the estate; that in any event they should not be credited by any commission upon the amount of principal never collected, upon the amount of bank and other stocks.”

“In England, courts of equity adhere to the principle, which had its origin in the Roman law, ‘that a trustee shall not profit by his trust,’ and therefore that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services; and in most cases it is gauged by a certain percentage on the amount of the estate. The allowances made by the auditor in this case are, we believe, such as are customary in similar cases, in Maryland and this

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district, where the trustee has performed his duties with honor and integrity.”

It is insisted, however, that even if compensation be allowable as a matter of law, yet under a true construction of the will in question no compensation could be allowed, because it was the purpose of the testator to make the trusts created by the seventh clause bear all of the expenses of the trusts created under prior clauses. Under this construction it is insisted that the legacies to the Leach children in the sixth clause are to be held free, not only from contributing to the compensation of the executors and trustees, but also from the payment of taxes, repairs, improvements, and other expenses appertaining to the properties belonging to those interests. It is further insisted under the same construction that the share of Mrs. McCreary (formerly Leach) in the estates created by the seventh clause cannot be held liable for any part of the compensation. This extraordinary construction is based upon two considerations—the first, that the great bulk of the estate was given to Mrs. Cowan and Mrs. Spilman; and secondly, that the word “net” is used in connection with the incomes to be paid over to Mrs. Cowan, Mrs. Spilman, and Mrs. Leach under the seventh clause, and is omitted in respect of the legacies of the Leach children, and that of defendant Saunders, and of Miss Dodson and Mr. Field, appearing respectively in the third, fourth, fifth, and sixth clauses of the will.

Nothing can be inferred from the mere inequality of the legacies. For example, among the Leach children,

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Robert Swepson Leach is given \$75,000, and the other two only \$25,000 each; while Mr. Saunders, who had lived in the home of his uncle as a member of his family more than twenty years, was given only \$20,000, and Miss Dodson, who was related in equal degree to testator with Mrs. Cowan, Mrs. Spilman, and Mrs. McCreary, was only given \$10,000. It was certainly not the intention of testator that the trustees should administer this large estate through its long continuance without compensation, on the ground that he had given two of them the greater part of the estate, since one of these trustees, Saunders, received only a small part of the estate, and the reason would not hold good as to him. Moreover, the eighth clause of the will provides for successors in trust to those named, and the testator could not have done otherwise than anticipate that such new trustees might be entire strangers to the legacies, and he could not have supposed that they could have been procured to act without compensation. Nor can any such potent significance be given to the use of the word "net" as claimed by complainants. It is perceived that under the seventh clause the trust does not cease upon the death of Mrs. Cowan, Mrs. Spilman, and Mrs. McCreary, but continues during the lives of their respective children, and as to these it is provided that upon the death of their mothers the "rents, interest, or income" of their respective shares shall be paid over to their children during their lives. Now, if the estates conveyed under the seventh clause of the will were to bear the burden of all of the expenses and support the legacies given under the

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sixth clause, and this inference is to be drawn from the use of the word "net," no reason is perceived why the word "net" should have been omitted in this connection, and used in the former; that is, in connection with the names of Mrs. Cowan. Mrs. Spilman, and Mrs. Leach (now McCreary). To escape this conclusion it would have to be urged that the estates given under the seventh clause were to bear the expenses of the estates given under the sixth clause, only during the lifetime of Mrs. Cowan, Mrs. Spilman and Mrs. Leach (now McCreary). No good reason can be assigned for such a discrimination between the estates while in the hands of Mrs. Cowan, Mrs. Spilman, and Mrs. McCreary, respectively, and in the hands of their children. Under such construction, giving such force to the use of the word "net," it would have to be held that during the lifetime of Mrs. Cowan, Mrs. Spilman, and Mrs. McCreary the seventh clause would have to bear the expenses of and support the sixth clause, but that after the death of these three that clause, though still continuing, would be relieved of the burden, which would have to be assumed by the sixth clause; that is, the sixth clause would then have to support itself. We do not think any such remarkable consequences could be deduced from the use of the word "net" in the first part of the seventh clause, and its omission from the third, fourth, fifth, and sixth clauses. The evidence shows that the will was drawn by an able lawyer, Maj. C. E. Lucky, and if such a burden had been intended to be thrown upon the seventh clause of the will as the support of the legacies contained in the third,

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fourth, fifth, and sixth clauses, it would have been expressed in clear terms, and would not have been left to be drawn as an uncertain and remote inference from the use of the single word "net." We are of the opinion that the use of that word was merely inadvertent, and that it could bear no such meaning as claimed.

What has been said covers both the matter of executors' compensation and trustees' compensation, since it is insisted by complainants that under the compensation claim there could be nothing allowed on either basis.

The assignment of error does not make the point that the compensation allowed was excessive, but does insist that the executors and trustees were not entitled to any compensation at all, because they performed no duties as executors and trustees, but that all of these duties were performed by the bookkeeper, whom they selected, Mr. John E. Hood, and by Maj. C. E. Lucky, their attorney, and subsequently by Judge Sansom, who succeeded Maj. Lucky. Upon this subject Mrs. Cowan, Mr. Saunders, Maj. Lucky, and Mr. Hood all testify. They show that the executors and trustees were diligent and careful in the discharge of their duties, and left nothing to the attorney, except what is usually left to attorneys under such circumstances, and that the bookkeeper did only clerical work. The responsibility and burden of the management of the estates rested upon the executors and trustees, upon whom it had been devolved by the will, and they have given careful, diligent, and intelligent attention to these interests ever since they were appointed.

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While we have said no attack is made upon the amount of the compensation, except in the way that the executors and trustees were not entitled to any at all, yet we may add that the only evidence introduced on this subject—that of Mr. C. B. Atkin, a man of large affairs, and Mr. Hood, who was perfectly familiar with the estate and the work done—shows that the amount of the compensation, \$3,600 per year for all the trustees, was reasonable when taken in connection with the large amount of the estate, about \$750,000, the complexity of its affairs, the annual income, about \$50,000, and the intelligence and the ability with which it has been cared for. Moreover, it is worthy of consideration that the ascertainment of the amount was only reached after anxious, careful, and even heated discussion between the executors and trustees themselves, attended by counsel. That there was a natural basis for difference of opinion and for discussion is obvious, when it is known that Mrs. Cowan and Mrs. Spilman were to pay about eighty per cent. of whatever compensation might be agreed upon, and Mr. Saunders, the third executor and trustee, was to pay only a fraction of such amount. Under such circumstances it is clear that they would not agree to pay Mr. Saunders practically out of their own pockets a considerable sum of money for a long series of years, unless the expenditure could be justified by the facts.

In addition, so far as concerns the fees paid to the executors as such, this has been settled under the administration proceedings in the county court of Knox county. These settlements were made, not only with no-

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tice to all parties, but all parties were present in the person of their attorney, Maj. C. E. Lucky. He represented, not only the executors, but Mrs. Leach personally and as guardian of her children. Under such circumstances it certainly would not only be *prima facie*, but could only be attacked by a bill to surcharge and falsify the accounts, and under such bill could be disturbed only by evidence of a clear and satisfactory nature. *Matlock v. Rice*, 6 Heisk., 33, 38. There is not only no clear and satisfactory evidence impeaching the amount allowed, but all of the evidence is in its favor.

We have not found it necessary to consider the question whether the county court has jurisdiction, under section 5414 *et seq.* of Shannon's Code, to pass the accounts of testamentary trustees in cases other than upon the death, resignation, or removal of an old trustee, and the appointment of a new one. That the chapter in which these sections appear does apply to testamentary trustees, as well as others, we think is clear. These sections should be read in connection with sections 3529, 3530, 6070, and 6031. The jurisdiction of the county court, of course, may be limited to the special cases of resignation, removal, and appointment of trustees and settlement of the accounts of the outgoing trustees, and to that extent be concurrent with the same jurisdiction in the circuit and chancery court, without going further. Whether the jurisdiction of the county court is so limited, we say, as we have previously said, that we do not deem it necessary in this case to consider, since on

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the evidence we are satisfied that the allowances made were proper.

The foregoing embraces all the matters contained in the first assignment, and that assignment, being without merit, must be overruled.

The second assignent makes the point that the executors wrongfully paid the sum of \$12,000 to E. Hepburn Saunders, one of the executors and trustees, on a claim by him against the estate, consisting of a check alleged to have been given to Mr. Saunders by his uncle, the testator, upon his marriage in 1901. The circumstances under which this amount was paid are shown in the record to be these: When the will was opened by Maj. Lucky and read in the presence of the legatees, it was known that Mr. Saunders had this claim. Before the executors qualified, the facts of the matter were examined by Maj. Lucky, who represented the executors, and also Mrs. Leach (now Mrs. McCreary) and her children; she being their guardian. After full consideration of this matter and the evidence upon which the claim rested, it was decided by the executors, under the advice and with the consent of Maj. Lucky, representing them, as well as the Leach interest, that the debt should be paid. We may add that since this \$12,000 came out of the estate passed by the seventh clause of the will, and therefore Mrs. Cowan and Mrs. Spilman were to pay eighty per cent. of it in a manner closely similar to the burden of the compensation above referred to, we may well believe the payment was not lightly or inconsiderately made from any point of view. The debt was

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paid, and was entered on the accounts of the executors as a credit. A settlement based on the account was regularly made in the county court, with the knowledge of all parties, and in the presence of the representative of all, Maj. Lucky, who prepared the settlement, and it was so passed in the county court and confirmed. On this settlement there was a balance of over \$35,000 found in the executors' hands, and final settlement was made by the executors, under which they turned over this balance to themselves as trustees under the will, and this was also made with the approval of Maj. Lucky, who still represented the Leach interest, but not at that time the executors, and he signed the settlement as attorney for Mrs. Leach.

The rule in this State is that a settlement in the county court in the usual course, although without notice, is *prima facie*, but may be questioned by a general bill, without the necessity of surcharging and falsifying the account. If notice is given, and *a fortiori* if the parties attend, there must be a bill of the character last mentioned before the account can be questioned; but infants who do not attend by their guardian may question by general bill, although notified; but, if infants attend by their guardian, the same rule will apply as in case of adults. *Alvis v. Oglesby*, 87 Tenn., 183, 10 S. W., 313; *Murray v. Luna*, 86 Tenn., 332, 6 S. W., 606; *Cannon v. Apperson*, 14 Lea, 581; *Shields v. Alsup*, 5 Lea, 513; *Milly v. Harrison*, 7 Cold., 213; *Elrod v. Lancaster*, 2 Head, 575, 75 Am. Dec., 749; *Turney v. Williams*, 7

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Yerg., 172; *Evertson v. Tappen*, 5 John. Ch. (N. Y.), 497, 511.

On the facts stated it appears there was a full investigation of this claim before it was allowed, no new evidence has been discovered, no fraud was committed, all parties in interest were represented, and the claim cannot be stricken out of the account, even under a bill to surcharge and falsify; and we think the present bill sufficiently full to meet that description. We deem it, therefore, unnecessary to review the merits of the particular claim and decide whether the parties acted correctly in agreeing at the time to its allowance. Under the agreement so reached the claim was allowed and paid. Under such circumstances the complaining parties will stand in the attitude of one who makes a voluntary payment of money, knowing all the facts, and subsequently sues to recover it. In cases of that kind, the general rule is there can be no recovery, even if there was no legal liability to pay in the first instance. As stated, we do not deem it necessary to review the merits of the controversy, or the question of legal liability, all of which were passed upon by the parties at the time of the settlement and payment. Under such state of facts, the account should not be reopened for examination of this claim.

We are not to be understood as holding that there is absolutely no case in which money or property paid or conveyed under mistake of law can be recovered. There may be such a recovery, even though the transaction was made under a mistake of law; but it must be under such

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circumstances as the court can see that it would be unconscionable for the party who obtained the advantage in such transaction or settlement to retain that advantage, and *e converso*, although there was a clear mistake of law, yet if the party benefiting by the transaction may retain the advantage in good conscience, neither a court of law nor equity will give relief to the complaining party. *Warren v. Williamson*, 8 Baxt., 427, 431; *Northrop v. Graves*, 19 Conn., 548, 50 Am. Dec., 264; *Baker v. Massey*, 50 Iowa, 399, 403, citing with approval Kerr on Fraud and Mistake, p. 398. See, also, 1 Story's Eq. Jur. (13th Ed.), section 111. In addition to *Warren v. Williamson*, supra, we have several cases in our reports which illustrate the principle: *Drew v. Clarke*, Cooke, 374, 380, 5 Am. Dec., 698; *Trigg v. Read*, 5 Humph., 529, 532-535, 42 Am. Dec., 447; *Sparks v. White*, 7 Humph., 86, 90; *Farnsworth v. Dinsmore*, 2 Swan, 38, 42; *King v. Doolittle*, 1 Head, 78, 84-88; *Dalton v. Wolfe*, 11 Heisk., 498, 502; *Spurlock v. Brown*, 91 Tenn., 241, 261, 18 S. W., 868.

In the case now before the court, even if it be true that Mr. Saunders could not have recovered the amount of the check in the suit against the executors, because of the absence of a technical consideration, yet there is no doubt, under the evidence, that it was given to him by his uncle as a marriage present, and was again taken possession of by the latter only for the purpose of preserving it. Under these circumstances Mr. Saunders can certainly retain the money with a good conscience, and the demand of the complaints is based upon strict

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law merely, and is against conscience. Under these circumstances, if a mistake was made, under the advice given by Maj. Lucky as representative of all the parties, and the subsequent payment of the claim by the executors pursuant thereto, still a court of equity will not grant relief.

It results that this assignment, also, must be overruled, and the chancellor's decree in all things affirmed.

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W. M. LOGAN v. J. E. BROWN, *County Court Clerk.*

(*Knoxville.* September Term, 1911.)

1. **PRIVILEGE TAXES.** Resident wholesale liquor dealer purchasing stock out of State is liable for privilege tax imposed by State statute.

Under the act of congress, known as the Wilson act (act of Aug. 8, 1890, ch. 728, 26 Stat., 313), providing that all intoxicating liquors transported into a State, and remaining therein for consumption, sale, or storage, shall, upon arrival therein, be subject to the operation of the laws in such State, enacted in the exercise of its police power, to the same extent as though such liquors had been produced therein, and shall not be exempt therefrom by reason of being introduced in original packages, the fact that a resident wholesale liquor dealer purchased all his stock without the State would not render a wholesaler's privilege tax imposed by a State statute violative of the commerce clause (art. 1, sec. 8) of the federal constitution. (*Post*, pp. 211-215.)

Acts cited and construed: Acts 1909, ch. 479.

2. **TAXATION.** Goods imported into this State for reshipment and distribution in other States are subject to taxation here.

Goods imported into this State, for the express purpose of reshipment and distribution to parties outside of the State, have come "to rest" within the limits of the State, and are, therefore, subject to taxation. (*Post*, p. 215.)

Cases cited and approved: *American Steel & Wire Co. v. Speed*, 192 U. S., 500; *General Oil Co. v. Crain*, 209 U. S., 211.

3. **INTOXICATING LIQUORS.** Subject to police regulation by exaction of a license fee from dealer.

The liquor traffic is a well recognized subject of police regulation; and the exaction of a license fee from a liquor dealer is an ordinary exercise of police power. (*Post*, p. 216.)

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4. INTERSTATE COMMERCE. Imposition of privilege tax on wholesaler of liquors in this State imported from other States and sold into other States is not a regulation of.

The purchaser of intoxicating liquors at wholesale without the State, who stores them at his place of business in this State, and, upon receiving mail orders for same from purchasers without the State, breaks the packages in which they were received, and repacks them in suitable quantities to fill the orders, and ships the same to purchasers without the State, receiving payment by checks or money orders through the mail, and making no sales to persons within the State, may be subjected to the privilege tax imposed by statute upon wholesalers of intoxicating liquors without violating the commerce clause (art. 1, sec. 8) of the federal constitution; for the imposition of such tax on such business is not a regulation of interstate commerce. (*Post*, pp. 215, 216.)

Cases cited and approved: *Fanning v. Gregoire*, 16 How., 534; *Conway v. Taylor*, 1 Black, 603; *Ferry Co. v. East St. Louis*, 107 U. S., 365.

5. INTOXICATING LIQUORS. Sale for all nonbeverage purposes under State and federal license for such business.

One having a license from the federal government may lawfully sell intoxicating liquors for medicinal, mechanical, scientific, culinary, and all other purposes, except for beverage purposes alone, upon obtaining a license from the State or paying the privilege tax imposed for such business. (*Post*, pp. 217-219.)

Cases cited and approved: *Kelly v. State*, 123 Tenn., 516; *Ficklen v. Taxing District*, 145 U. S., 1.

6. SAME. Purchasing and receiving intoxicating liquors for sale and reshipment out of the State may be subjected to privilege tax by State.

Where a liquor dealer has his place of business in this State where he receives and stores intoxicating liquors produced without the State, and here prepares the same for reshipment

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to purchasers in other States, this State may declare his acts a privilege, and tax him for such. (*Post*, pp. 219, 220.)

- 7. PRIVILEGE TAXES.** Dealer is not relieved because he receives all his goods from other States and resells them to parties in other States.

The fact that a dealer, engaged in a business or occupation, imports his goods from other States, and after storing them here, sells and ships them to purchasers in other States, will not relieve him from an occupation tax. (*Post*, pp. 220-222.)

Cases cited and approved: *Woodruff v. Parham*, 8 Wall., 123; *Brown v. Houston*, 114 U. S., 622; *Cargill v. Minnesota*, 180 U. S., 452; *American Steel & Wire Co. v. Speed*, 192 U. S., 500.

FROM CAMPBELL

Appeal from the Chancery Court of Campbell County.
—H. G. KYLE, Chancellor.

CLARENCE TEMPLETON, for complainant.

ATTORNEY-GENERAL CATES and **JOHN JENNINGS**, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by the complainant to recover a wholesale liquor dealer's privilege tax exacted of him by the defendant, the clerk of the county court of Campbell county. The tax was paid under protest, and suit brought for its recovery within the statutory time.

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From a decree in favor of the complainant, defendant has appealed to this court. A stipulation as to the facts of the case is filed, as follows:

“It is agreed that on the trial of this case, the following facts shall be considered as properly proven:

“The complainant, William Logan, a citizen and resident of Campbell county, Tenn., and living in the town of Jellico, on March 14, 1911, opened and has since been conducting a wholesale business of selling liquors to citizens and residents of other States than the State of Tennessee. Said business has been and is being conducted in the following manner: Complainant's storehouse and place of business is in Jellico, Tenn., where the complainant keeps on hand a stock of liquors, wines, brandies, gins, and beers of an aggregate value of \$3,000 to \$3,500. These goods the complainant buys in wholesale quantities from liquor dealers in other States, and pays for them by check mailed by him in the postoffice at Jellico, Tenn. He orders these goods by mail; the orders being mailed by him at the postoffice in Jellico, Tenn. He places some orders with traveling salesmen representing nonresident liquors dealers. These orders, placed with such traveling salesmen, are likewise paid by checks, mailed at the postoffice in Jellico, Tenn. All of these orders, so filled by said nonresident liquor dealers, are delivered to a common carrier at a point in such foreign State for delivery to the complainant at Jellico, Tenn. All beer is thus purchased by complainant in quantities of not less than one barrel of bottled beer, and no keg beer is handled by him. All other

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goods are purchased by the complainant in this manner, in quantities of not less than two cases. A case is a box or package consisting of twelve quarts, or twenty-four pints, or forty-eight half pints. These goods are stored by the complainant at his place of business in Jellico, Tenn., where the complainant then proceeds and conducts a selling business as follows:

“Complainant makes all sales by means of mail orders received by him at the postoffice at Jellico, Tenn., having been previously mailed to him by nonresidents of the State of Tennessee at points within other States than the State of Tennessee. These mail orders are accompanied by checks or postoffice or express money orders. Complainant makes no sales to any parties in the State of Tennessee. All goods purchased by him are purchased from parties outside of Tennessee, and all goods sold by him are sold to parties outside of Tennessee. The wholesale packages which he buys are stored by him at his place of business and broken for sale and shipment according to the demands of his sales. All sales made by complainant are consummated by packing the goods which he has sold and placing them in the office and charge of a common carrier of freight or express at Jellico, Tenn., for transportation to the party making the order outside of the State. The complainant refused and resisted the payment of the privilege tax demanded by the defendant, on the grounds stated in the bill, but paid same on the 7th and 8th of June, 1911, in the amounts stated in the bill, and for the reason that the clerk of the county court of Campbell county, with a

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duly authorized officer, was present at his place of business with a distress warrant, demanding payment thereof, or threatening a levy and sale of his property upon his refusal. Payment was made under protest and duress, and so received by the defendant. Complainant took out and paid for United States revenue license, as required by the United States statutes, and not for the purpose or intention of violating the liquor laws of Tennessee. The complainant's application for said government license shows on its face that complainant applied for same for the sole purpose of doing an interstate business."

As will be seen from this statement, the complainant is a resident of Tennessee, has a place of business in Jellico, Tenn., and a considerable stock of liquors there, which he is engaged in selling. Obviously he is a wholesale liquor dealer. As such, he is liable for the privilege tax imposed on that business by chapter 479, Acts of 1909, unless he is relieved therefrom by reason of the fact that he is making his sales to parties outside the State.

The circumstance that he purchases all his stock without the State has no weight in the case. The act of congress, known as the Wilson act (Act Aug. 8, 1890, ch. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), provides:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or territory, or remaining therein, for consumption, sale or storage therein, shall upon arrival in such State or terri-

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tory, be subject to the operation and effect of the laws of such State or territory, enacted in the exercise of its police powers, to the same extent, and in the same manner, as though such liquids or liquors had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

So it is frankly conceded by learned counsel for complainant that the question here would be the same and complainant would have the same rights, whether his liquors in stock were shipped into this State, or produced in this State. The only question, therefore, is whether complainant's business is exempt from the privilege tax demanded by the State, on account of the fact that his sales have been made to nonresidents. In other words, is the taxation of a business such as his a violation of the commerce clause (article 1, section 8) of the federal constitution?

The stock of goods which he has in his storehouse is certainly not exempt from State taxation. Even though he imports it for the express purpose of reshipping and distributing all of it to parties outside of the State, still it has come "to rest" within the limits of the State, and is therefore subject to taxation. *American Steel & Wire Company v. Speed*, 192 U. S., 500, 24 Sup. Ct., 365, 48 L. Ed., 538; *General Oil Co. v. Crain*, 209 U. S., 211, 28 Sup. Ct., 475, 52 L. Ed., 745.

Neither is the complainant protected from the privilege tax by the commerce clause of the federal constitu-

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tion, in our opinion, and this, we think, is true for several reasons:

First. The liquor traffic is a well-recognized subject of police regulation. The exaction of a license fee from a liquor dealer is an ordinary exercise of police power. The mere levy of an occupation tax upon a liquor dealer, a resident of Tennessee, with his house and business establishment in Tennessee, even though he ships his sales to other States, cannot be held to be a regulation of commerce between the States. Certainly it is no more a regulation of commerce than the imposition of a tax upon the owners of ferries whose boats ply between landings in different States. The power of the State so to tax ferries was upheld in *Ferry Co. v. East St. Louis*, 107 U. S., 365, 2 Sup. Ct., 257, 27 L. Ed., 419.

A license was required in that case by the city of East St. Louis, and the court said:

“The exaction of a license fee is an ordinary exercise of police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power to license, tax, and regulate ferries, the latter may impose a license tax on the keepers of ferries, although the boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce.” *Ferry Co. v. East St. Louis*, supra; also *Fanning v. Gregoire*, 16 How., 534, 14 L. Ed., 1043; *Conway v. Taylor*, 1 Black, 603, 17 L. Ed., 191.

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Second. The agreed statement of facts is peculiarly worded. Referring to complainant's selling business, it says that he "makes all sales;" that payments "are" made to him; that goods "are stored" by him, etc. The present tense is used throughout. There is no distinct averment in the stipulation of facts that the complainant has not heretofore made sales in Tennessee.

If we concede, however, that it is intended to be said that complainant has never made sales to parties within the State, still there is no guaranty that he will continue so to exclude such parties from buying hereafter. He has his house in Tennessee, his liquors in Tennessee, his equipment and location, and is prepared to make sales in Tennessee. He is entitled, under the law, to sell his liquor for medicinal, mechanical, scientific, culinary and all other purposes, save for beverage purposes alone. *Kelly v. State* (Wholesaler's Case), 123 Tenn., 516, 132 S. W., 193.

Looking to the organization and equipment of complainant's business, it must be conceded that he is engaged in the general occupation of a liquor dealer in Tennessee. Such occupation is declared a privilege and a tax is demanded by the State for its pursuit.

The fact that particular sales so far made by him have been to nonresidents does not relieve his business of the privilege tax, by reason of any provision of the federal constitution.

This conclusion seems to us fully warranted from the case of *Ficklen v. Taxing District*, 145 U. S., 1 12 Sup. Ct., 810, 36 L. Ed., 601.

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In this case, the court considered a merchandise broker's tax, which was imposed upon certain parties in the taxing district of Memphis, the business of one of whom was entirely between nonresident principals.

Speaking of the case, the court said:

"In the case at bar, the complainants were established and did business in the taxing district, as general merchandise brokers, and were taxed as such under section 9 of chapter 96 of the Tennessee Laws of 1881, which embraced a different subject-matter from section 16 of that chapter. For the year 1887, they paid the tax of \$50 charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business, and became liable to pay the privilege tax in question. It was fixed in part, and in part graduated according to the amount of commissions received. Although the principals happened, during 1887, as to the one party to be wholly nonresident, and as to the other largely so, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for nonresidents."

The authorities are reviewed to a considerable extent, and the result of the entire case we find to be well summarized in one of the headnotes, as follows:

"A State legislature may tax trades, professions, and occupations in the absence of inhibition in the State constitution in that regard; and, where a resident citizen is

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engaged in a general business, subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another States, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution."

While it is true, at the conclusion of this opinion, the following language is used:

"What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record." While it is true this language is used, it has no application here, for this complainant is no broker or agent, doing business for nonresident principals. He is a resident of Tennessee, doing business for himself in Tennessee. The circumstance that he has failed to apply for license to engage in the occupation of a liquor dealer does not determine the question whether or not he is engaged in such general occupation. We think he is so engaged, and is accordingly liable for the tax, although his sales, so far, have been to purchasers without the State.

Third. The tax imposed upon complainant has reference to his business within the State, and interposes no obstacle to his sales and shipments out of the State.

He has his business house in Tennessee, where he gathers his stock goods. He here receives his purchases,

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breaks bulk, assorts his stock, and here keeps it. He gets his orders, prepares his shipments, delivers to the carriers, and receives his remittances in Tennessee. In fact, every detail of his business is within, and under the protection of, the State of Tennessee, except that he makes his sales to parties without the State, and purchases his stock from outside the State, which latter incident has no bearing on the controversy, by reason of the provisions of the Wilson act, heretofore mentioned.

We are of opinion that the State has a right to declare the doing of these things within her borders a privilege, and to tax such privilege accordingly.

The State may tax a business or occupation, and the fact that the stock of a particular dealer, engaged in such business or occupation, happens to have been bought and brought in from some other State will not relieve him of the tax. *Woodruff v. Parham*, 8 Wall., 123, 19 L. Ed., 382; *Brown v. Houston*, 114 U. S., 622, 5 Sup. Ct., 1091, 29 L. Ed., 257.

As was observed by the supreme court, in the case of *American Steel & Wire Company v. Speed*, supra, these two cases announced a doctrine years ago which has never since been questioned, and "has become the basis of the taxing power exerted for years by all the States of the union. The cases themselves have been approvingly referred to in decisions of this court too numerous to be cited."

If a dealer, engaged in a particular business, may be required to pay a tax levied upon that business, even though he purchases all his goods without the State, we

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can perceive no reason why a dealer, engaged in a particular business, may not be required to pay a tax levied upon that business, even though he sells all his goods without the State. The tax is no more a burden on commerce in the one instance than in the other. It is not exacted of the interstate traffic in either case, but of the business in both cases.

Upon this question, the somewhat recent holding of the supreme court, in *Cargill v. Minnesota*, 180 U. S., 452, 21 Sup. Ct., 423, 45 L. Ed., 619, seems determinative.

In that case, the State of Minnesota had passed an act regulating the business of grain elevators. Among other things, it required that all persons operating such elevators should obtain a license therefor from the proper State authorities. A fee was charged for this license. Considerable business was transacted at these elevators in the way of purchasing wheat, but the entire sales of the particular elevator considered in the case referred to were to nonresidents, and all its grain was sold and shipped to parties outside the State.

It was urged upon the court that the license required of this elevator, in view of the character of business it was doing, was a violation of the commerce clause of the federal constitution.

In response to this, the court said:

“It is also contended that the requirement of a license from the defendant company is inconsistent with the power of congress to regulate commerce among the States. This view cannot be accepted. The statute puts

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no obstacle in the way of the purchase, by the defendant company, of grain in the State, or the shipments out of the State of such grain as is purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect to business conducted at an established warehouse in the State, between the defendant and the sellers of the grain. We do not perceive that, in so doing, the State has intrenched upon the domain of federal authority, or regulated, or sought to regulate, commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license." *W. W. Cargill Co. v. Minnesota, ex rel., etc.*, 180 U. S., 452, 21 Sup. Ct., 423, 45 L. Ed., 619.

We are of opinion that the foregoing is sound authority upon which to base the conclusion heretofore announced, that this complainant is only taxed with reference to matters transacted by him at his business house, and as to his purchasing business and other parts of his business, and does not refer to or burden his sales to parties outside the State.

For the reason stated, the decree of the chancellor will be reversed, and the bill dismissed.

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GRISWOLD, HALLETTE & PERSONS v. JAMES D. DAVIS *et al.*

(*Knoxville*. September Term, 1911.)

1. **BILLS AND NOTES.** Payment must be made to the holder or his agent.

As a general proposition the maker of a negotiable promissory note can satisfy it only by payment to the holder or to his duly authorized agent for that purpose. (*Post*, p. 229.)

Case cited and approved: *Marling v. Nommensen*, 127 Wis., 363.

2. **SAME.** Same. Payment to unauthorized agent not in possession of the securities does not protect the debtor; burden to show special authority.

As a general rule the debtor is not justified in paying the principal debt to an agent of the holder who is not expressly authorized to receive it, unless the agent, at the time of payment, has in his possession the securities paid, and makes that fact known to the debtor; and, if the person to whom payment is made is not in possession of the written securities, the burden is upon the debtor to show that the one to whom payment was made had special authority to receive payment, or that he was represented by the creditor to have such authority. (*Post*, pp. 229, 230.)

3. **SAME.** Same. Same. Payment to unauthorized agent without apparent authority evidenced by possession of the securities does not protect the debtor.

One without actual authority to do so, but assuming to act as the agent of another in receiving payment of the principal debt, and who has not the securities in his possession, cannot be deemed to have such authority; and it is indispensable to investing him with such apparent authority that he have the possession of the securities, and that knowledge of such possession be brought home to the debtor at the time of making the payment. (*Post*, pp. 230-233.)

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Cases cited and approved: *Smith v. Kidd*, 68 N. Y., 130; *Crane v. Gruenwald*, 120 N. Y., 274; *Williams v. Walker*, 2 Sandf. Chy. (N. Y.), 325; *Lawson v. Nicholson*, 52 N. J. Eq., 821; *Wilson v. Campbell*, 110 Mich., 580.

Cases cited, distinguished, and disapproved: *Campbell v. Gowans*, 35 Utah, 268; *Quinn v. Dresbach*, 75 Cal., 159; *Morgan v. Nell*, 7 Idaho, 629; *Spencer v. Wilson*, 4 Munf. (Va.), 130.

4. **SAME.** Purchased and paid for by mutual credits and charges on deposit account of purchaser with seller constitutes an innocent holder, notwithstanding resale before maturity and taking back after maturity.

Where the complainants purchasing a note of the payee had money on deposit with him as banker to their credit, and paid for the same before its maturity by crediting such payee and banker with the value of the note, and by the banker's charging its value against the deposit account, they were purchasers for value and innocent holders; and it seems that where such complainants sold said note to another innocent purchaser for value before its maturity, and after its maturity paid the same and took it back, they will be protected as innocent holders. (*Post*, pp. 227, 233, 234.)

FROM McMINN.

Appeal from the Chancery Court of McMinn County.
—T. M. McCONNELL, Chancellor.

W. D. CARSWELL and D. C. YOUNG, for complainants.

MCCROSKEY & PEACE and NORMAN B. MORRELL, for defendants.

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MR. JUSTICE LANSDEN delivered the opinion of the Court.

The bill in this case is filed for the purpose of foreclosing a deed of trust upon a tract of 150 acres of land executed by the defendant Davis to one Allen, trustee, for the purpose of securing two notes and the annual interest coupons attached thereto payable to Burr & Knappe. The chancellor refused to foreclose the deed of trust and dismissed complainants' bill. From this decree, they have appealed and assigned errors.

The facts necessary to be stated are that in 1904, the defendant Davis made application to the Georgia Loan & Trust Company, of Macon, Ga., through Allen, for a loan of \$1,300. This application was forwarded by Allen to the Georgia Loan & Trust Company through the firm of Smith & Carswell, attorneys of Chattanooga. After abstracts of title were prepared by Allen and passed upon favorably by Smith & Carswell, the Georgia Loan & Trust Company approved the loan, and forwarded to them the deed of trust, together with the notes and interest coupons, and the money to be delivered to Davis through Allen. It appears that at the time Davis made application for the loan there was a mortgage on his farm in favor of Mrs. Bloom for \$700, and he owed the First National Bank of Athens about \$600, and it was to pay these debts that he desired the money secured by this deed of trust.

In making the abstract of title for Davis, Allen failed to show in the abstract that the mortgage existed in

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favor of Mrs. Bloom. At the request of Allen, Smith & Carswell forwarded the money for Davis to him by express. When Allen received the money, he turned over \$602.95 to Davis and stated at the time that the balance of the \$1,300 had not come, and that Mrs. Bloom would have to wait, but that Davis could take the \$600 and pay the debt due the bank. This was done. The notes were dated September 1, 1904, and were due September 1, 1907, with interest payable annually. The interest coupon on the \$600 note was \$36. Davis paid this first coupon to Allen by delivering to him \$34.50, which Allen accepted with some explanation to Davis that is not shown in the record. Allen paid the interest coupon on both notes by remittance to the Georgia Loan & Trust Company of the sum due. Before the maturity of the notes secured by the deed of trust, Davis negotiated a sale of his farm to the defendant Hicks. He made known to Allen his sale to Hicks, stating that it was a condition of the trade that the deed of trust to secure Burr & Knappe and the mortgage in favor of Mrs. Bloom should be paid off and satisfied of record. Allen agreed to accept from Davis the \$600 which he paid him at the time the loan was made, but stated that he did not have in his possession either the deed of trust or the two notes that Davis had previously executed in favor of Burr & Knappe; and that he could not get possession of the securities and deliver them to Davis before the following September, at which time an interest payment was due. Allen agreed, however, to satisfy the deed of trust upon the margin of the record. This was done by

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Davis paying the \$600 to Allen and Allen indorsing upon the margin of the record where the deed of trust was recorded that he (Allen) was the holder of the notes secured by the deed of trust, and he acknowledged payment of the same and satisfaction of the deed of trust. This was all explained to Hicks, and upon this satisfaction of the deed of trust, Hicks paid the purchase price to Davis, and Davis paid off the mortgage to Mrs. Bloom.

While the Georgia Loan & Trust Company negotiated the loan with Davis, through Smith & Carswell and Allen, and passed upon its desirability, the money which was advanced upon the deed of trust was furnished by Burr & Knappe, and the notes were made payable and delivered to them as payees. On the 29th of September, 1904, Burr & Knappe sold the two notes to Griswold, Hallette & Persons for full value and indorsed them without recourse. Burr & Knappe are bankers and brokers in the city of Bridgeport, Conn., and the complainants carry an account with them as bankers. The complainants are brokers and are regular customers of Burr & Knappe. Payment was made by Burr & Knappe charging the account of complainants with the purchase price of the notes and the complainants crediting the account of Burr & Knappe with like amount. The complainants sold the notes to A. W. Healy for full value and before due. After the notes became due, the Georgia Loan & Trust Company notified Burr & Knappe that the notes would be paid upon presentation, and Burr & Knappe in turn notified the complainants, who likewise

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notified Healy. Healy brought the notes to complainants and received payment in other securities for their full value. This was after their maturity. The notes were forwarded to the Georgia Loan & Trust Company, and demand of payment was made upon due presentation, which was declined.

Allen represented himself to Hicks as the agent of Burr & Knappe and executed receipts to Hicks for sums received as such agent. Burr & Knappe knew nothing of Allen and were never informed that Allen was receiving moneys from Davis pretending to be their agent. Interest was forwarded by Allen to the Georgia Loan & Trust Company, and by that company to Burr & Knappe, and Burr & Knappe would pay interest received to the holder of the notes at the time. There is nothing to indicate that they ever knew any fact that would suggest to them that Allen was pretending to be their agent or that he had failed to deliver to Davis the entire amount loaned by them, or that Davis had undertaken to pay back the \$600 received from Allen, or that Allen had undertaken to satisfy the deed of trust until after the maturity of the notes and just before the filing of this bill.

Upon these facts, it is said in support of the chancellor's decree: First, that Allen was the agent of Burr & Knappe, and as such was authorized to receive the \$600 repaid to him by Davis, and also that his failure to pay over to Davis the full amount of the loan was the failure of Burr & Knappe; and, second, that the complainants are not purchasers for value in due course of trade, and

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therefore they hold the securities subject to the defenses that might be interposed to them in the hands of Burr & Knappe. As a general proposition, the maker of a negotiable promissory note can satisfy it only by payment to the holder or to his duly authorized agent for that purpose. *Marling v. Nommensen*, 127 Wis., 363, 106 N. W., 844, 5 L. R. A. (N. S.), 412, 115 Am. St. Rep., 1017, 7 Am. & Eng. Ann. Cas., 364.

It is not claimed that Allen was especially authorized by Burr & Knappe to receive payment of the notes in question. The insistence is that Allen, having acted for them in making the application for the loan, in appraising the property, and in preparing the abstracts of title, and also in receiving payment from Davis of one interest coupon, that this authorized Davis to rely upon the representations of Allen that he was such agent, and, though not directly authorized by his principal to receive payment, he was acting within the apparent scope of his authority.

We are of opinion that as a general rule the debtor is not justified in paying the principal debt to an agent of the holder who is not expressly authorized to receive it, unless the agent, at the time of payment, has in his possession the securities paid and makes the fact known to the debtor, and, if the person to whom payment is made is not in possession of the written securities, the burden is upon the debtor to show that the one to whom payment was made had special authority to receive payment, or that he has been represented by the creditor to have such authority. There can be no basis for the debt-

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or relying upon the apparent or ostensible authority of an agent not in possession of the written securities to receive payment. The mere act of paying the principal debt to one not the holder of negotiable instruments, and not in possession of them, is such gross negligence upon the part of the debtor that it is difficult to conceive how he could rely upon an apparent or ostensible authority of such agent to receive the payment. Possession of the securities properly indorsed of itself, and in the absence of countervailing facts, clothes the agent with apparent authority to receive payment from and deliver them to the debtor. And the absence of the securities in the hands of the alleged agent is such a powerful circumstance of want of authority, that one making payment to him cannot claim that he appeared to have authority to receive payment, when in fact he did not.

Agency rests upon contract between the principal and the agent. This contract cannot be made to appear to a third party by the declarations of the agent only, nor can the principal be held bound by a course of conduct upon the part of the agent unknown to him. For the acts of his agent within his express authority, the principal is liable because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority which he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such case would be to enable him to commit a fraud upon innocent persons. The same principle of equity which forbids the principal to

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deny responsibility for the acts of his agent within the scope of his apparent authority requires that the party dealing with the alleged agent shall show that he was aware of the acts from which the apparent authority is deduced, that he acted in reliance upon them, and that he did not act negligently, but used reasonable means to ascertain whether the power was possessed by the agent, and that in good faith he believed the agent was especially authorized to do the thing.

All of the authorities are in substantial accord with the views herein stated. Some of the cases seem not to distinguish between payment to an agent without authority, but claimed to be acting within his apparent authority, and an agent specially authorized to receive payment. Expressions can be found in those cases to the effect that such an agent so receiving payment of the principal loan can still be found to have had implied authority to receive the payment, and the absence of the securities from his possession is merely a circumstance to be considered in connection with all the facts. *Campbell v. Gowans*, 35 Utah, 268, 100 Pac., 397, 23 L. R. A. (N. S.), 414. But an examination of the facts of these cases will show that the courts found that the agent was authorized to receive the payment, or else the principal, by his course of dealing with the debtor through the alleged agent, had estopped himself to deny the authority of the agent, or had ratified his act. *Quinn v. Dresbach*, 75 Cal., 159, 16 Pac., 762, 7 Am. St. Rep., 138; *Morgan v. Neil*, 7 Idaho, 629, 65 Pac., 66, 97 Am. St. Rep., 264.

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But, as we have said, the better rule supported by the greater weight of authority is that one without actual authority to do so, but assuming to act as the agent of another in receiving payment of the principal sum due, who has not the securities in his possession, cannot be deemed to have such authority. It is indispensable to investing him with such apparent authority that he have possession of the securities, and that knowledge of such possession be brought home to the debtor at the time of making the payment. *Smith v. Kidd*, 68 N. Y., 130, 23 Am. Rep., 157; *Larson v. Nicholson*, 52 N. J. Eq., 821, 31 Atl., 386; *Crane v. Gruencwald*, 120 N. Y., 274, 24 N. E., 456, 17 Am. St. Rep., 643; Jones on Mortgages, section 964; Meacham on Agency, section 373; *Wilson v. Campbell*, 110 Mich., 580, 68 N. W., 278, 35 L. R. A., 544; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.), 325.

In the case last cited, the learned assistant vice chancellor reviewed the English and American authorities at very great length, commencing with *Henn v. Connisby*, Cases in Chancery, 93, decided in 1668, and reviewed each case down to the date of the decision in 1845. He found perfect harmony in all of the authorities except the single case of *Spencer v. Wilson*, 4 Munf. (Va.), 130, and this case he criticised "as either carelessly reported or was a loose decision." This case is often cited by the various courts, and it appears to be a leading case upon the subject. The rule is there stated as follows:

"The debtor is authorized to infer that the solicitor or agent is empowered to receive both interest and principal, from his having possession of the bond and mort-

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gage. . . . But such inference, being founded upon the custody of the securities, ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor, who makes payment to the solicitor or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made."

The rule here adopted is not only supported by reason and authority, but it is easiest understood and followed in actual practice. It requires only the most natural and prudent thing for a debtor to do in the matter of paying the principal debt, and makes him responsible for his gross negligence. It tends to prevent the alleged agent from practicing fraud both upon the debtor and the creditor and will make certain such payments and minimize litigation.

While what has been said is conclusive of the entire case for the reason that payment to Allen was not a payment to Burr & Knappe, it is proper to dispose of the second contention of defendant's counsel. It is said that the complainants, having taken the paper from Healy after its maturity, and not having paid value for the same at the time of their purchase from Burr & Knappe, are not innocent holders of the notes sued on for value. This contention is based upon the statement of complainants to the effect that, at the time they purchased the notes from Burr & Knappe, they had money on deposit with them to their credit, and the value of the notes was credited by them to Burr & Knappe against this deposit, and likewise was charged by Burr

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& Knappe to the complainants. It is sought to bring this case within the authority of *Banking Co. v. Hall*, 119 Tenn., 548, 108 S. W., 1068. In that case the notes in controversy were purchased by the Elgin City Banking Company from W. S. Dunham, and were paid for by the cashier of the Elgin City Banking Company placing the amount paid for the notes to the credit of Dunham at the First National Bank of Elgin. It was held that it was not shown that the credit given to the Dunhams in the First National Bank was ever used by them, and therefore the court could not determine whether the credit was real and substantial. However, this case is the converse of the *Hall Case*. The complainants had money on deposit with Burr & Knappe, and, when they purchased the notes sued on, they credited the account of Burr & Knappe with the purchase price, and Burr & Knappe in turn charged their account with like amount. Neither party had the power after the entry of the debit and credit items in this transaction to change them. The complainants had suffered the loss of their credit, and Burr & Knappe had received the benefits of it as effectually as if the money had actually passed. The result is that the decree of the chancellor is reversed, and a decree will be entered here for the complainants.

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J. WILL TAYLOR v. ALVIS J. CARR.*

AND

W. C. ADAMS v. HUGH McDONALD.

(Knoxville. September Term, 1911.)

1. **CONTESTED ELECTIONS.** Cannot be determined by city council without previously established rules under statute conferring the power under previously established rules.

Under the charter of the town of La Follette (Acts 1897, ch. 161), which provides (by its eighth section) that the city council shall be the sole judge of the qualification and election of its own members, and (by its thirteenth section) that a contest over the election of any city officer shall be heard and determined by the city council under such rules as it shall have previously established for such hearing, the council has no primary right or jurisdiction to determine the contested election of a member of the council, where it has not previously established any rules or methods for conducting such a contest, as required by the charter. (*Post*, pp. 242, 243.)

Acts cited and construed: Acts 1897, ch. 161, secs. 8 and 13.

Cases cited and approved: *Veile v. Funck*, 17 Iowa, 365; *Darrow v. People*, 8 Colo., 417.

2. **SAME.** Supervisory jurisdiction of circuit court over contested election cases before a city council.

The circuit court has supervisory jurisdiction by *certiorari* over the proceedings of a city council in a contested election case. (*Post*, p. 243.)

Case cited and approved: *Staples v. Brown*, 113 Tenn., 643.

3. **SAME.** In circuit court, where no other provision is made. Where no other provision is made for the contest of an election, it is triable in the circuit court, under section 6063 of Shan-

* Superintending control and supervisory jurisdiction of superior over inferior courts, see note in 51 L. R. A., 33.

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non's Code; and where the primary jurisdiction of a city council is ineffective because of its failure previously to establish rules for conducting such contests, as required by its charter, the primary jurisdiction is in the circuit court. (*Post*, pp. 243, 244.)

Code cited and construed: Sec. 6063 (S.); sec. 4997 (M. & V.); sec. 4225 (T. & S. and 1858).

Case cited and approved: Baker v. Mitchell, 105 Tenn., 610.

4. MUNICIPAL CORPORATIONS. City council of La Follette is composed of the aldermen, and mayor is not a member.

Under the charter of the town of La Follette (Acts 1897, ch. 161, as amended by Acts 1901, ch. 460), the city council is composed only of the aldermen, and the mayor is not a member or part of it. (*Post*, p. 244.)

Acts cited and construed: Acts 1897, ch. 161; Acts 1901, ch. 460.

5. CONTESTED ELECTIONS. Original jurisdiction is in circuit court, and only cumulative jurisdiction is in city council, when.

Under the charter of the town of La Follette (Acts 1897, ch. 161) providing (by its thirteenth section) that a contest over the election of any city officer shall be heard and determined by the council, under such rules as it shall have previously established for such hearing, and under section 6063 of Shannon's Code giving the circuit court jurisdiction of contested elections where such jurisdiction is not conferred upon some other tribunal, the city council is not a "judicial tribunal," within the sense and meaning of said section, so that the circuit court has original jurisdiction of a contested election for mayor of such town; for the jurisdiction conferred upon the city council is merely cumulative, and the circuit court continues to hold its original jurisdiction. (*Post*, pp. 244, 245, 249.)

Code cited and construed: Sec. 6063 (S.); sec. 4997 (M. & V.); sec. 4225 (T. & S. and 1858).

Acts cited and construed: Acts 1897, ch. 161, sec. 13.

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Cases cited and approved: *Crump v. Williams*, at Jackson, April term, 1910; *People, ex rel., v. Hall*, 80 N. Y., 117; *McVeaney v. Mayor*, 80 N. Y., 185; *Veile v. Funck*, 17 Iowa, 365; *State, ex rel., v. Kraft*, 18 Ore., 550; *Commonwealth v. Allen*, 70 Pa., 469; *State, ex rel., v. Kempf*, 69 Wis., 470; *State v. McKinnon*, 8 Ore., 492; *Kendell v. Camden*, 47 N. J. Law, 64; *State, ex rel., v. Fitzgerald*, 44 Mo., 425; *People v. Londoner*, 13 Colo., 303; *State, ex rel., v. Anderson*, 26 Fla., 254; *Commonwealth v. McCloskey*, 2 Rawle (Pa.), 309.

6. SAME. Grounds may be stated in two aspects based upon the invalidity and the validity of the election.

Where the petition in a contested election case, over the office of mayor, asks, first, that the election be declared void, and the petitioner be declared the incumbent holding over; and, secondly, that petitioner be declared the successful candidate, in case the court should hold that the election was not invalid, but was a legal election, the grounds of the contest are stated in two aspects, which may be united in one petition. (*Post, pp. 245, 247.*)

Case cited and approved: *Maloney v. Collier*, 112 Tenn., 78, 102, 103.

7. ELECTIONS. To be held under the Dortch law in cities in civil districts of 2,500 population.

A city election in an incorporated town in a civil district containing a population of twenty-five hundred is properly held under the Dortch law (Acts 1890, ex. ses., ch. 24, sec. 2; Acts 1891, ch. 225; Acts 1897, ch. 17), and not under the uniform ballot law (Acts 1891, ex. ses., ch. 21; Acts 1893, ch. 101. (*Post, p. 246.*)

8. CONTESTED ELECTIONS. Petition alleging petitioner's election by a majority vote, wrongfully revised by commissioners of election so as to give contestee a majority, is not subject to demurrer.

Where the petition in a contested election case, over the office of mayor, alleges that the returns made up by the election

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officers under the Dortch law (Acts 1890, ex. ses., ch. 24; Acts 1891, ch. 225; Acts 1897, ch. 17), then and there in force, gave to the petitioner a majority of the votes, that he received 190 votes and the contestee 185 votes, but that, when these returns were sent to the commissioners of elections, they assumed to go behind the poll lists and tally sheets, to examine the original ballots, and to throw out votes, and that, by such action, the result was so changed as to give the contestee a majority, to whom a certificate was thereupon issued, a demurrer to such petition upon the alleged ground that it shows no case in that it admits that the contestee received a majority of the votes cast under the Dortch law is bad, because the petition does not admit what the demurrer assumes that it admits. (*Post*, pp. 246-248.)

9. SAME. Not jury cases.

Election contests are not jury cases. (*Post*, pp. 249, 250.)

Cases cited and approved: *Blackburn v. Vick*, 2 Heisk., 377, 383; *Moore v. Sharp*, 98 Tenn., 491, 494; *Shields v. McMahan*, 112 Tenn., 4, 5 (and authorities cited); *Corey v. Lugar*, 62 Ind., 60; *Pedigo v. Grimes*, 113 Ind., 148; *Hughes v. Holman*, 23 Ore., 481; *Ewing v. Filley*, 43 Pa., 384; *Goran v. Jackson*, 32 Ark., 553; *Wise v. Martin*, 36 Ark., 305; *Ford v. Wright*, 13 Minn., 518.

10. JURY TRIALS. Amendment of statute as to method of calling for jury, but not so as to extend the number of jury cases.

The statute (Acts 1875, ch. 4), providing a method of demanding a jury in cases then triable by jury, was amended by a subsequent statute (Acts 1889, ch. 220), as to the method of calling for a jury, but not so as to extend the number of jury cases. (*Post*, p. 250.)

Acts cited and construed: Acts 1875, ch. 4; Acts 1889, ch. 220.

11. SAME. Order placing contested election case upon the jury docket may be changed to nonjury docket at a subsequent term; practice points; "merits of controversy."

The action of the trial judge in a contested election case in

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changing the case from the jury docket to the nonjury docket, at a subsequent term, after an order had been made at a prior term placing it upon the jury docket, but on the faith of which no steps had been taken by either party, affecting the merits, is not erroneous, because election contests are not jury cases, and such former order was simply a point of practice in the preparation of the case which was in the discretion of the court, since the rule that trial judges cannot, at subsequent terms, change orders made at former terms, does not apply to mere practice in the preparation of the case, but only to the "merits of the controversy," which term is not confined to the points in actual litigation, but includes orders on points of practice, where steps affecting the merits have been taken upon the faith of such orders. (*Post*, pp. 250, 251.)

12. **CONTESTED ELECTIONS.** Petition charging petitioner's election on the face of the returns, and that the returns were illegality changed into a majority for contestee, states a case for petitioner.

A petition in a contested election case, over the office of mayor, which charges that on the face of the returns the petitioner received a majority of five, and that the commissioners of election illegally assumed to purge the returns by casting out sixteen to eighteen ballots, which had been cast for the petitioner, thereby changing the result into a majority in favor of the contestee, states a case in favor of the petitioner. (*Post*, p. 251.)

13. **SAME.** Amendment of answer will not be allowed after petitioner has closed his evidence, when.

Where, after the trial of a contested election case had progressed two days, after a great many witnesses had been examined, and a great volume of evidence had been introduced, and after the petitioners had closed their evidence, and after the defendants had begun their testimony, the defendants asked leave to amend their answer, a denial of the leave to amend was proper, as the amendment was offered too late. (*Post*, pp. 251-253.)

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14. **SAME.** Amendment of answer involving the right of commissioners of elections to go behind the returns is without merit.

The commissioners of elections have no power to go behind the returns, and a proposed amendment to the defendant's answer, based on the theory that they had such power, is without merit. (*Post*, p. 253.)

15. **SAME.** Amendment inviting court to recount ballots, without allegation of the object of the recounting, is insufficient, and is properly refused.

Where the proposed amendment to the answer in a contested election case in effect invited the circuit court to make a recount of the ballots generally, without any allegation as to the particular matters to be determined by such recounting, other than the general result of the election, such proposed amendment was insufficient to enable the court to exercise that power, and was properly refused by the trial judge. (*Post*, p. 253.)

16. **SAME.** Commissioners of elections cannot go behind the returns and recount the ballots, but must preserve the ballots under seal for use in a contest.

Under Acts 1907, ch. 436, requiring, by section 15, that the officer holding the election shall deliver the polls or returns of the election, sealed as received, together with the ballots cast; to the commissioners of elections, and requiring, by section 16, that, on the first Monday after the election, the commissioners of elections shall file the said polls and returns at the courthouse, and certify in writing the results shown thereby, and deliver to each person elected a certificate of election, and requiring, by sections 17 and 18, the preservation of the poll lists and tally sheets, the duties of the commissioners of elections are only ministerial, and not judicial, and they cannot go behind the returns and examine and recount the ballots, but they must preserve the ballots, under seal as delivered to them, for the use of the parties in the case of a contest. (*Post*, pp. 253-257.)

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Code cited and construed: Secs. 1268, 1270-1277, 1279, 1280, 1283 (S.).

Acts cited and construed: Acts 1907, ch. 436, secs. 15-18.

Cases cited and approved: State, ex rel., v. Wright, 10 Heisk., 237, 252-255; State, ex rel., v. Board of Inspectors, 6 Lea, 12, 24, 25; State, ex rel., v. Gossett, 9 Lea, 644.

17. ELECTIONS. Ballots perforated by mistake and not so marked for identification are valid.

Ballots perforated by mistake, and not so marked by the voters for purposes of identification, are valid. (*Post*, pp. 258, 259.)

FROM CAMPBELL

Appeal from the Circuit Court of Campbell County.—
G. MC. HENDERSON, Judge.

LINDSAY, YOUNG & SMITH, JOUROLMON, WELCKER & SMITH, L. H. CARLOCK, and JOHN P. ROGERS, for plaintiffs in error.

W. A. OWENS, WRIGHT & JONES, AGEË & PETERS, and JESSE L. ROGERS, for defendants in error.

MR. JUSTICE NEIL delivered the opinion of the Court.

These are consolidated cases brought from the circuit court of Campbell county. They were instituted in that court by the defendants in error, Carr and McDonald,

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against the plaintiffs in error, Taylor and Adams, to contest an election for city offices of the city of La Follette, held on the 29th of March, 1910.

The commissioners of election gave the certificate of election to Taylor as successful candidate for mayor of the city, and to Adams as successful candidate for alderman of the Third ward. The unsuccessful candidates thereupon filed these suits, for the purpose of contesting the election, in the circuit court.

The petition was met by a demurrer, under which certain questions were made which we shall now state and consider.

There were other questions which we shall not refer to until after we have set forth the substance of the petition.

For the consideration of the points we shall first mention it is not necessary that the petition shall be given with any more particularity than as above.

The question is raised by the second, third, and sixth grounds of demurrer, that the primary jurisdiction of these contests was in the city council of the city of La Follette, and that the circuit court had no original jurisdiction.

In order to a proper understanding of this question it is necessary to make the following excerpts from the charter of La Follette (chapter 161 of the Acts of 1897) :

Section 8, among other things, contains the following:

“The city council shall be the sole judge of the qualification and election of its own members, and shall have

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the power to determine the rules of its own proceedings, punish its members for disorderly conduct, and with the concurrence of four of its five members-elect, may expel a member."

Section 13 contains the following:

"If the election of any officer shall fail in consequence of an equal number of votes having been cast for two or more persons for the same office, the city council shall cast lots among the persons so voted for, in such manner as it may prescribe, by resolution, and the person who shall be successful according to the terms of such resolution in the casting of lots shall be declared elected. If the election of any city officer shall be contested, the contest shall be heard and determined by the city council under such rules as the said council shall have previously established for such hearing."

Hugh McDonald claims to have been elected as a member of the city council, and under the provisions of section 8 that body would have the primary right to pass upon his controversy, in view of the language used in the section referred to, to the effect that the council shall be "sole judge" of the matter (*Darrow v. People*, 8 Colo., 417, 8 Pac. 661), subject to the supervisory jurisdiction of the circuit court, under the writ of *certiorari* (*Staples v. Brown*, 113 Tenn., 643, 85 S. W., 254). The jurisdiction of the council, however, could not be invoked, because it does not appear that it had established any rules or methods for conducting a contest, as it was required to do under section 13. *Veile v. Funck*, 17 Iowa, 365. There was, therefore, no other tribunal to

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which application could be made, except the circuit court, under section 6063 of Shannon's Code; no provision having been made by statute for such contests other than under said section. *Baker v. Mitchell*, 105 Tenn., 610, 59 S. W., 137.

If the mayor of La Follette were also a member of the city council, the same rule above indicated as to Hugh McDonald would apply to Carr, since he was a candidate for the office of mayor. It is insisted by defendant Taylor that the mayor is a member of the city council. In view of what has been said in disposing of this part of the case as to McDonald, it is perhaps unnecessary to say that, upon a very careful examination of the charter above referred to, and the amendment of 1901 (Acts 1901, ch. 460), we are of the opinion that the city council is composed only of the aldermen, and the mayor is not a part of it. The city council is not a judicial tribunal, within the sense and meaning of Shannon's Code, section 6063.

In the case of *Crump v. Williams*, decided by this court at the April term, 1910, at Jackson, it was held that language in the charter of the city of Memphis similar to the last sentence quoted from section 13, *supra*, did not confer exclusive original jurisdiction upon the city authorities to dispose of the contest, but that the jurisdiction was merely cumulative, and the circuit court had original jurisdiction. The weight of authority in other States is to the same effect. *People, ex rel. Hatzell, v. Hall*, 80 N. Y., 117; *McVeaney v. Mayor*, 80 N. Y., 185, 36 Am. Rep., 600; *Veile v. Funck*, *supra*;

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State, ex rel., v. Kraft, 18 Or., 550, 23 Pac., 663; *Commonwealth v. Allen*, 70 Pa., 469; *State, ex rel., v. Kempf*, 69 Wis., 470, 34 N. W., 226, 2 Am. St. Rep., 753; *State v. McKinnon*, 8 Or., 492; *Kendell v. Camden*, 47 N. J. Law, 64, 54 Am. Rep., 117; *State of Missouri, ex rel. Turner, v. Fitzgerald*, 44 Mo. 425; *People v. Londoner*, 13 Colo., 303, 22 Pac., 764, 6 L. R. A., 444; *State, ex rel., v. Anderson*, 26 Fla., 254, 8 South., 1; *Commonwealth v. McCloskey*, 2 Rawle (Pa.), 369.

The circuit court, therefore, had original jurisdiction of the contest instituted by Carr; no other court being vested therewith.

We shall now state, with as much brevity as possible, the substance of the petition. Before doing this, however, it should be stated that the petition is filed with a double aspect.

First, in Carr's case, that the election may be declared void, and the petitioner be declared the incumbent, inasmuch as he was mayor at the time the election of March 29, 1910, was had, and was ousted by Taylor without authority of law; and, secondly, for the purpose of having Carr declared the successful candidate in case the court should hold that the election was not invalid, but was a legal election. The petition stated the contest in two aspects, within the authority of *Maloney v. Collier*, 112 Tenn., 78, 102, 103, 83 S. W., 667.

We shall now confine our attention in what immediately follows to the mayor's contest, and state the contents of that petition.

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It is alleged that an election was held on the date above mentioned for the election of mayor and the members of the city council of the city of La Follette; that the officers holding the election, being doubtful as to whether the election should be held under the Dortch law or under the uniform ballot law, conducted two elections at the same place—that is, one under each method; that the election under the uniform ballot law was void, because registration certificates were demanded of the voters, and that thereby ninety-six persons were prevented from voting, which would have been sufficient to change the result; and that, of these ninety-six persons, forty-one would have voted for contestant Carr.

It is alleged in terms that the election under the Dortch law was invalid, because this law did not control; but it is stated as a fact that the city of La Follette is within a civil district containing 2,500 population. Therefore, while the conclusion of law announced in the petition is that this election was void because the city of La Follette did not fall within the law, yet the statement of fact just indicated shows that did fall under the law. Indeed, both sides now agree that the election was properly held under the Dortch law—that is, that the Dortch law controlled, and not the uniform ballot law.

It is charged that the returns made up by the election officers under the Dortch law gave to the petitioner, Carr, a majority of the votes—that is, Carr 190 votes and Taylor 185 votes; but that, when these returns were sent to the commissioners of election, they assumed to

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go behind the poll lists and tally sheets, examine the original ballots, and throw out votes, and, so acting, the result was so changed as to give the defendant Taylor a majority, and that thereupon they issued the certificate to him. This action is complained of.

The petition sets out the names of various persons who were charged to have been illegal voters, who cast their ballots for contestee Taylor.

Complaints are made of the place of holding the election in the Third ward, the location of the registrars with respect to the location of the officer holding the election at that precinct, and the judges; also the mode of entrance into the voting places, and of the fact that deputy sheriffs were placed near the entrance.

There are various charges with respect to the election conducted on the uniform ballot plan; but, inasmuch as both sides concede, as we have already stated, that the election should have been conducted under the Dortch and registration law, we need not mention this matter further than to say that it was charged that the petitioner was found on the face of the returns to have less votes than the defendant, because of the fact that his voters were kept away by the illegal demand for registration certificates, and it is further charged in respect of this election that on a proper recount of the votes there would be a majority of thirty in favor of petitioner Carr.

The foregoing general statement is sufficient for the disposition of the demurrer, which shall now be stated.

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The first ground of demurrer makes the point that the petition shows no case, because it admits that Taylor received a majority of eighteen votes in the election conducted under the uniform ballot law, and also a majority of the votes cast under the Dortch and registration law. The demurrer then continues: "Therefore petitioner fails to make out a case upon the face of his petition entitling him to contest said election, and he is not aided by the allegations that other parties residing within said municipality failed to vote, because it is shown by said petition that a greater number failed to vote than was claimed by petitioner would have voted for him; therefore, failing to show upon the face of the petition that had they voted for him as claimed in the petition," he would have been successful. "If the others not voting had voted against him, the result would not have been changed." The language we have quoted refers alone to the case attempted to be made under the election held under the uniform ballot law, which election is not now before the court for consideration. As to the election under the Dortch and registration law, the petition does not concede that the defendant received the majority of votes, but charges directly the reverse; that is, it charges that on the face of the returns the petitioner received a majority of five votes, and that the commissioners of elections illegally went behind the returns and attempted to throw out votes, and thus unlawfully changed the result.

The second, third, fourth, and sixth grounds of demurrer we have already considered, as raising the

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point that the circuit court had no jurisdiction of the contest. The fifth is not insisted upon, and we need not notice it. The seventh ground has been practically disposed of in what we have already said.

The trial judge overruled the demurrer and proceeded to hear the case.

He adjudged that Carr was elected mayor of the city, and McDonald elected to the city council. Thereupon the defendants below, Taylor and Adams, appealed to this court, and have here assigned errors.

These errors are divided into errors of law and errors of fact.

The first error of law assigned is that which questions the jurisdiction of the circuit court, which we have already considered.

The second assignment of law is based upon the fact, first, that the trial judge declined to allow the case to be tried before a jury; and, secondly, that after the case had been placed upon the jury docket, on application of the defendants below at a former term of the court, this order was revoked at a subsequent term, and the case placed on the nonjury docket.

This assignment must be overruled.

Election contests are not jury cases. *Shields v. McMahan*, 112 Tenn., 4 and 5, 81 S. W., 597, and authorities cited; *Moore v. Sharp*, 98 Tenn., 491, 494, 41 S. W., 587; *Blackburn v. Vick*, 2 Heisk., 377, 383. To same effect, see *Pedigo v. Grimes*, 113 Ind., 148, 17 N. E., 700; *Corey v. Lugar*, 62 Ind., 60; *Hughes v. Holman*, 23 Or., 481, 32 Pac., 298; *Ewing v. Filley*, 43 Pa., 384; *Wise*

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v. Martin, 36 Ark., 305; *Goran v. Jackson*, 32 Ark., 553; *Ford v. Wright*, 13 Minn., 518 (Gil., 480).

Plaintiffs in error insist that the rule was changed by chapter 220 of the Acts of 1889. This is a mistaken view. The act referred to was an act to amend chapter 4 of the Acts of 1875. That chapter provided a method of demanding a jury in cases "now triable by jury." Chapter 220 of the Acts of 1889 simply amended the method. It did not purport to extend the number of jury cases. The two acts must be construed together, and, although there is some language in the latter act which, standing alone, would seem to favor the plaintiffs in error's contention, yet when taken in connection with the former act, which the latter was intended to amend, it is perfectly clear that the purpose was such as we have just indicated, and that purpose only; that is, merely to regulate the method of calling for the jury in jury cases.

As to that part of the assignment which complains of the action of the trial judge in changing the case from the jury docket to the nonjury docket, at a subsequent term, after an order had been made at a prior term placing it upon the jury docket, there was no error. No right connected with the merits of the case was determined, but simply a point of practice in the preparation of the case. This was within the discretion of the court. The rule that trial judges cannot, at subsequent terms, change orders made at former terms, does not apply to mere practice points, but only to the merits of the controversy. When we say "merits of the controversy," we do not confine the observation merely to points in actual litigation.

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Of course, if the trial judge should rule out a deposition at some former hearing, this would be so interconnected with the merits as that he could not change the order at a subsequent term. We give this merely as an illustration. We may further add that if, after the trial judge has made an order upon a point of practice, and on faith of that order steps have been taken by either party affecting the merits, the order could not be changed at a subsequent term.

The third error of law assigned involves two propositions: First, that the petitioner Carr does not state sufficient facts to show that he was elected; secondly, that he does not charge that the election was valid.

We have perhaps sufficiently disposed of this matter in what we have said touching the demurrers. However, as to the first point, the petition charges that, on the face of the returns, the petitioner received five majority, and that the commissioners of election illegally assumed to purge the returns by casting out sixteen to eighteen ballots which had been cast for the petitioner, thereby changing the result into a majority in favor of contestee Taylor. This states a case in favor of the petitioner.

That part of the assignment which makes the point that the petition charges that the election was void we have already sufficiently treated in another connection.

The fourth error of law assigned is that the trial judge "erred in declining to allow defendants to amend their answer, so as to aver that one of the clerks in the second ward gave to contestant Carr four tallies too many, and that the other clerk added on a like number, and erased

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from Taylor's name that number of tallies, which amendment should have been allowed after the admission for the first time by contestant's counsel that the election under the Dortch law was legal and valid."

The trial of the cause began on August 21, 1911. On August 23d, after a great many witnesses had been examined, and a vast volume of evidence introduced the defendants below asked leave to insert, at the end of the first sentence, in paragraph 9, on page 5, of their answer, the following:

"Because it was shown that the tally sheets from the second ward did not record the true result, and by virtue of the provisions of the act of the Legislature of 1907 making the ballots a part of the returns, the election commissioners compared said ballots and found that one clerk had given the petitioner Carr credit for more votes than he had received, which occurred by reason of one of the clerks having more tallies than the other, and in order to make the books appear alike the other clerk added the additional tallies; that said election commissioners also compared the ballots in all wards, with the result that the defendant received 193 votes and the petitioner 175 votes. The defendant avers that the circuit court also has the right and should compare said ballots, so as to ascertain the true vote between petitioner and defendant."

This amendment was offered after the petitioners had closed their evidence, and after the defendants had begun their testimony. The trial judge held that the amend-

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ment came too late, and likewise that it was without merit.

As to the merits:

The amendment was based on the theory that the commissioners of election had the right to go behind the returns and investigate the ballots, and was brought forward for the purpose of enabling the trial court to pass upon the validity of such action on the part of the commissioners, and also to enable the court itself to recount the ballots, and decide which party was elected. The commissioners had no power to go behind the returns, and an amendment based on the theory that they had such power could not be otherwise than without merit.

As to the last sentence of the amendment, if it could be separated from what goes before, it is simply an invitation to the court to make a recounting of the ballots generally, without any averment as to the particular matters to be determined by such recounting, other than the general result of the election; in other words, an invitation to the court to take the place of the original election officials. We do not think that on such general allegation or request the court could exercise that power. There would have to be some specific points indicated which the court should try by the ballots. Moreover, in the present case, it appears that the ballots were not sealed, as required by Acts 1907, ch. 436, section 15, before being delivered to the commissioners of election, and, for that reason, they could not be examined, unless it should be made to appear with great clearness that

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they had been so kept as not to be the subject of interference or change. It does not appear from the evidence that the ballots in the present case had been so kept. The commissioners of election testify that while in their possession they were not altered, but they were placed in the safe of Mr. Allen, the county judge of the county, not sealed up, and subject, of course, to interference by any one who might have access to that safe through Allen, and the testimony of the latter was not taken. Likewise it is not clear what care was exercised over the ballots after the election, and before they were handed to the commissioners of election. Under these circumstances, even if the amendment had been granted, it would have been futile.

We are of the opinion, therefore, that the trial judge acted correctly in refusing to grant the amendment, both because it came too late, and also because it was without merit.

We have said that the commissioners of election had no authority to go behind the returns and recount the ballots. The contestees insist that they had such power, because, under Acts 1907, ch. 436, section 15, the ballots were for the first time required to be preserved and placed in the hands of the commissioners of election. That section reads: "It shall be the duty of the officer holding the election to deliver the polls or returns of the election sealed as received, together with the ballots cast in said election, to the said commissioners of election, not later than 12 o'clock noon on the first Monday after the election."

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Under the chapter referred to the commissioners of election appoint, not only the officer to hold the election, but the judges and the clerks as well for each voting precinct in their county. The duties of the judges and clerks are not prescribed in this act, but by other legislation.

Section 1268 of Shannon's Code provides that the returning officer, by whom is meant the officer holding the election, shall receive the ballot in the presence of the judges. These latter officers pass upon the qualifications of the voter. Sections 1270 to 1276, inclusive. When the officer receives the ballots he is required to call the name of the voter in a distinct voice, and the clerks of the election must take down on separate lists or books the name of every person voting, and must attest the correctness of these lists under their hands. Section 1277. When the election is finished, the returning officers and judges must, in the presence of such of the electors as may choose to attend, open the box, and read aloud the names of the persons which shall appear in each ballot, and the clerks at the same time must number the ballots, each clerk separately. Section 1279. If a void ticket is voted, it is the duty of the judges to reject it when the votes are counted. Section 1280. Formerly it was the duty of the officer holding the election to compare the polls at the courthouse on the first Monday after the election, and deliver to each person elected a certificate of his election. Section 1283. Under some statutes passed after the Code, and especially under chapter 436 of the Acts of 1907, this matter was changed,

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and it became the duty of the officer holding the election, as provided by section 15, *supra*, to deliver "the polls or returns of the election sealed as received, together with the ballots cast in said election" to the commissioners of election not later than 12 o'clock noon on the first Monday after the election. Section 16 provides: "That on the first Monday after the election it shall be the duty of the commissioners of election to file the said polls and returns at the courthouse, and to certify in writing, signed by at least two of them, the result as shown by said polls or returns, and to deliver to each person elected a certificate of his election." In order to enable the commissioners of election to perform this duty, they must have before them, not only the poll lists, but also the tally sheets of clerks of elections, because on the latter appear the number of votes received by each candidate. It is the duty of the judges and clerks and of the precinct returning officers to certify to the correctness of these papers. From these papers—that is, from the poll lists and tally sheets—the commissioners of election must ascertain by calculation who has received the greater number of votes, and will accordingly deliver the certificate of election. In this respect they have succeeded to the duties originally devolved upon the officers holding the election in each precinct. They cannot any more examine the ballots than could the officer holding the election under prior statutes. The ballots are passed upon by the judges of election in each voting precinct as they are received, and later as they are counted out. The duties of the com-

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missioners of election are only ministerial. Such officers cannot recount the ballots. In performing the duties referred to they are only final returning officers, and such officers have no judicial powers. *State, ex rel., v. M. J. Wright*, 10 Heisk., 237, 252 to 255; *State, ex rel., v. Board of Inspectors*, 6 Lea, 12, 24, 25; *State, ex rel. Anderson, v. Gossett*, 9 Lea, 644. If the commissioners of election should undertake to recount the ballots, they would be performing the duties which are by law assigned to the judges of election, or exercising the functions of a court in trying an election contest. The only purpose of including the ballots in section 15 was to preserve them for the use of parties in the case of a contest. No directions are given in the act as to the method of their preservation, sections 16 to 18, inclusive, referring to the lists of voters or poll lists and the tally sheets; that is, those papers which must appear under the certificate of the officers holding the election and the judges and clerks. Under section 15 the ballots must be delivered to the commissioners of election sealed up, and it necessarily results that they must be kept by these officers in that form until needed upon a contest of election, and then in case of contest should be opened only in some form fair to both sides, after due notice, and after the adoption of proper precautions to prevent spoliation or mutilation.

In what has been said we have disposed of the first, second, and third assignments of error upon the facts, and need not refer to them further.

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The fourth error assigned on the facts is: "That the circuit judge was in error in finding that ten or twelve ballots of the Third ward had been cast for Carr and McDonald, and unlawfully rejected, and not counted, because of having been perforated, whereas the proof shows that said ballots, in addition to having been perforated, also bore other marks which disfigured and rendered said ballots illegal and void."

It is unnecessary to discuss this assignment in disposing of Carr's contest, because it is evident from what has been said that as to him the case may be determined upon the face of the returns; there being no pleading on the part of the defendants to impeach these returns. On the basis Carr was elected by five votes. However, it is necessary to consider this assignment in disposing of the case of McDonald because on the face of the returns it appears that he received for alderman only sixty-three votes, while his opponent, Adams, received sixty-seven votes, leaving a majority of four for Adams.

It appears from the evidence that there were sixteen ballots thrown out, which were not included in those sent to the commissioners of election, but were left lying upon a table. There is much evidence on the part of the defendants, indicating that these ballots were marked both for Carr and his opponent, and for McDonald and his opponent, and hence could not be counted for either; likewise that part of them were not marked at all, and part marked in such a way as that it could not be told for whom the vote was intended. We have considered all of this evidence, and are of the opinion that it is too

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indefinite to meet the clear and distinct statement on the part of the witnesses for contestant that the ballots were marked for McDonald and Carr. The trial judge found that twelve of them were so marked. We find that at least eight of them were so marked, and perhaps twelve. It results that these ballots were improperly thrown out. Counting them for McDonald, he is found to have received a majority of the votes. These ballots are referred to in the record as perforated ballots; but we think the perforation was made by mistake. We are quite clear in our conclusion that they were not marked by the voters for purposes of identification.

It results that the judgment of the trial court is affirmed, both as to Carr and McDonald. The contestees will pay the costs of the appeal. The costs of the court below will be paid as fixed by the trial court.

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SOUTHERN RAILWAY COMPANY v. R. H. BROOKS.

(Knoxville. September Term, 1911.)

- 1. COMMON CARRIERS.** Duties of railroad companies to prevent personal injuries to passengers; damages for failure.

It is the duty of railroad companies, as common carriers of passengers, to exercise the highest practicable degree of care and skill to prevent injury, though they are not insurers of their safety; and for failure to do so, they are liable in damages for all injuries sustained by passengers. (*Post*, p. 264.)

- 2. RAILROADS.** Statute prescribing precautions for prevention of accidents is imperative and mandatory.

The statute (Shannon's Code, sections 1574-1576) requiring railroad companies to keep some person on their locomotives always upon the lookout ahead, and, when any person, animal, or other obstruction appears upon the road, to observe certain precautions, and to employ every possible means to stop the train and prevent an accident, and exempting them from liability upon their observance of said requirements, and subjecting them to liability for their nonobservance thereof, is imperative and mandatory. (*Post*, pp. 264-267.)

Code cited and construed: Secs. 1574-1576 (S.); secs. 1298-1300 (M. & V.); secs. 1166-1168 (T. & S. and 1858).

Cases cited and approved: Railroad v. Connor, 9 Heisk., 23; Hill v. Railroad, 9 Heisk., 823; Railroad v. Scott, 87 Tenn., 501; Railroad v. Foster, 88 Tenn., 679; Rapid Transit Co. v. Walton, 105 Tenn., 417.

Cases cited and distinguished: Routon v. Railroad, 1 Shannon's Cases, 528; Railroad v. Troxlee, 1 Lea, 521; Railroad v. Selcer, 7 Lea, 558.

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3. **SAME.** Duty safely to carry passengers is paramount to all others, and is superior to observance of statutory precautions, when and when not.

The duty of railroad companies safely to carry and deliver their passengers is paramount to all others, and is superior to the statutory requirements and precautions stated in the preceding headnote; and the statutory precautions should not be observed, when to do so would imminently imperil the lives and limbs of passengers and employees on the train; but these precautions should be observed when human life is in danger on the road, and the probability of slight injuries to passengers and employees, or even serious injuries growing out of unusual positions which they may at the time occupy, will not excuse the observance of such precautions for the protection of the life of a trespasser. However, where compliance with the statutory precautions will, with reasonable certainty, imperil the lives or limbs of passengers, such compliance should not be made; but where no great danger to passengers will ordinarily follow, or can be anticipated with reasonable certainty, the statute must be observed, especially in favor of human life; and a railroad company shall not be liable for damages resulting from its observance of these rules. (*Post*, pp. 267-269.)

Code cited and construed: Secs. 1574-1576 (S.); secs. 1298-1300 (M. & V.); secs. 1166-1168 (T. & S. and 1858).

FROM HAMBLLEN.

Appeal from the Circuit Court of Hamblen County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—G. MC. HENDERSON, Judge.

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SUSONG & BIDDLE, McCANLESS & COLEMAN, and HOLLOWAY & HICKEY, for Railroad.

KING & KING and W. N. HICKEY, for Brooks.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

This is an action to recover damages for personal injuries sustained by R. H. Brooks while a passenger upon one of the passenger trains of the Southern Railway Company. The accident occurred at a station of the railway company, while the train was moving at about two miles an hour and almost in the act of stopping, and resulted from the sudden application of the emergency brakes by the engineer, causing the entire train to lurch backward and recoil with unusual force and violence. The passengers for that station had been notified to disembark and were preparing to do so. Brooks had arisen from his seat, turned towards the rear of the coach, and was in the act of going back to assist his wife, who was also a passenger, and, when the brakes were applied, was thrown down and against a seat, sustaining serious and permanent personal injuries.

The railway company in its defense proved by the engineer in charge of the locomotive that the brakes were applied in order to prevent the striking and probable killing of a boy who suddenly appeared upon the track some ten feet ahead of the pilot and was crossing to the opposite side, angling towards the engine, in compliance

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with the statute requiring certain precautions to be observed by railroad companies to prevent injuries to persons and animals upon the road before an approaching train.

The trial judge charged the jury that it was the duty of the railway company to keep some one upon its locomotives always upon the lookout ahead, and, when any person, animal, or other obstruction appeared upon the road, to sound the alarm whistle, put down the brakes, and use every possible means to stop the train and prevent the accident; but, while this was true, it was also its duty to exercise the highest degree of care, skill, and foresight possible for the safety of its passengers, and that it was not required to observe the statutory precautions when it would endanger the lives or limbs of passengers. In effect, the jury was instructed that, where the duty to observe the statutory precautions conflicted with that to passengers, the latter must prevail and be discharged. The charge is quite lengthy; but, while not in the words of the trial judge, the above is the substance and effect of the instruction given to the jury upon this subject.

There was verdict and judgment in favor of the plaintiff below. The railway company carried the case to the court of civil appeals, and there assigned as error, among other things, the instruction to the jury above stated, which assignment was sustained, and the case is now before us upon *certiorari* prosecuted by Brooks to reverse the judgment of that court.

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Railroad companies, as common carriers, undertake to safely carry and deliver their passengers at their destination. In the performance of this contract and obligation, it is their duty to exercise the highest practicable degree of care and skill, and for failure to do so they are liable in damages for all injuries sustained by passengers. They are not insurers of the safety of passengers, as they are of freight. Every one who travels on the conveyances of a common carrier assumes some risks, such as are necessarily incident to that mode of travel, and for an injury sustained without the fault or negligence of the carrier there is no remedy. Injuries caused by the ordinary and unavoidable jolts and jars of moving trains are within this class. This duty of carriers to their passengers must be strictly discharged, and generally an injury to a passenger raises a rebuttable presumption of negligence and liability.

Railroad companies also owe duties to persons who may appear upon their road, or within striking distance of their trains. The statute (Shannon's Code, sections 1574-1576) requires railroad companies to keep the engineer, fireman, or some other person upon their locomotives always upon the lookout ahead, and, when any person, animals, or other obstruction appears upon the road, to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident, and provides that upon failure to observe these precautions the company shall be liable for all damages to person or property resulting from any accident or collision that may occur, and also, when

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such precautions are observed, that they shall not be responsible for such damages; the burden of proving the observance being upon the company. The provisions of this statute have been repeatedly held by this court to be imperative and mandatory, and to require absolute obedience. They must be complied with, regardless of whether it appears they are necessary or will be effective to prevent an accident. *Hill v. Railroad Co.*, 9 Heisk., 823; *Railway Co. v. Foster*, 88 Tenn., 679, 13 S. W., 694, 14 S. W., 428.

When the precautions are not observed, the company is liable for the damages resulting from a collision. *Rapid Transit Co. v. Walton*, 105 Tenn., 417, 58 S. W., 737. The several requirements of the statute, sounding the alarm whistle, putting down the brakes, and employing all possible means to stop the train and prevent an accident, are all imperative. They are not to be observed in the order stated in the statute, but the precaution or thing which under the facts of the particular case is most available or effective to avert a collision and prevent the injury must be done. *Railway Company v. Scott*, 87 Tenn., 501, 11 S. W., 317.

We have no case arising from an apparent conflict of these duties to passengers and persons upon the road where a passenger was injured. All our cases in any way involving the question here presented relate to injuries to persons or animals appearing upon the road before locomotives.

Routon v. Railroad Company, 1 Shan. Cas., 528, was an action to recover for a cow killed upon the track near

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a trestle, in which the engineer testified that it would have endangered the safety of the train to have reversed his engine at that particular place. In discussing the necessity of observing the statute this court said: "The law does not demand of a railroad company the sacrifice of human life, either the lives of its employees or of its passengers, in order to save a mere article of property."

Railroad Company v. Troxlee, 1 Lea, 521, was an action to recover for a mule killed upon the road, where the engineer failed to reverse his engine because of danger, on account of the speed, of wrecking the train. In this case it is said: "The statutes made by the legislature for the government of railroads in cases of this kind are quite stringent, and we think justly so; but it certainly was never intended by the lawmakers that anything should be required which would endanger the lives or limbs of persons upon the train."

The case of *Railroad Co. v. Selcer*, 7 Lea, 558, was also an action for a mule killed. The engineer testified that to have reversed the engine would have endangered his life and been very injurious to the engine. This court, in passing upon an error assigned for the failure of the trial judge to charge that upon the testimony of the engineer the company was excused from the observance of the statute, said that injury to the engine or machinery furnished no excuse, but in regard to the danger to the life of the engineer used this language:

"It has been repeatedly held by this court that if the train is moving at such speed, or if the circumstances of its situation are such, that it would endanger the lives

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of persons on the train, the engineer is not bound to reverse the engine, although by doing so the collision itself may have been avoided."

The case of *Railroad v. Conner*, 9 Heisk., 23, was an action to recover for the death of a child killed upon the road, in which it was insisted that the paramount duty of the company was to its passengers, and therefore observance of the statute where it would endanger their lives or limbs was not required. It is there said:

"We do not say that the means employed to stop the train should be such as would cause imminent risk and danger to the passengers; but a slight increase of the danger to the passengers will be no excuse for failing to follow the positive mandate of the statute. The facts of the case call for no further discussion of the question. There is no proof that any of the means usually employed to stop the train would be at great or imminent danger to passengers. It would not do to hold that employes running the train shall be allowed to excuse themselves from failing to comply with the positive requirements, by the mere expression of an opinion that to do so would endanger the passengers. The nature and extent of that danger should, at least, be more clearly shown."

The duty of railroad companies to safely carry and deliver their passengers is paramount to all others. They contract to do this, and public policy demands and requires a strict performance of the terms of the contract. This was so by the common law in force long before the enactment of the statute, and it was not the in-

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tention of the legislature to modify or abrogate the duty in favor of trespassers. We are of the opinion, and hold, that the precautions prescribed should not be observed, when to do so would imminently imperil the lives or limbs of passengers and employees on the train. The object of the statute is primarily to protect human life, and to construe it otherwise than here done would in many cases defeat that object. But less than imminent danger of serious bodily injury or death to those on the train will not excuse observance of the precautions, especially when the life of one on the road is involved. In other words, the probability of slight injuries to passengers and employees, or even serious injuries growing out of unusual positions which they may at the time occupy, will not excuse observance of the statute for the protection of the life of a trespasser. While not directly involved here, we do not think the safety of passengers should be jeopardized in any case to prevent injuries to animals upon the road.

Humanity and public policy require that the duties of railroad companies to their passengers and to persons upon their roads be reconciled as far as possible to do so. No hard and fast rule can be made applicable to all cases. Each case where conflict presents itself must be determined upon its own particular facts. Where compliance with any particular provision of the statute, under attending conditions and environments, such as the speed of the train, a steep descending grade, a trestle or bridge, or other circumstance of peculiar danger, will imperil the lives or limbs of passengers with reasonable

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certainty, it should not be done. But where the place of the impending collision is level, or the speed of the train reasonably slow, or other conditions exist from which no great danger to passengers will ordinarily follow, or can be anticipated with reasonable certainty, usual conditions being considered, the statute must be observed, especially in favor of human life.

And in the event of a collision in the case first stated there will be no liability for injuries done persons or property upon the road; and in the latter there will be none to passengers upon the train. Neither the common law nor the statute requires impossibilities of railroad companies, or makes them liable for damages for acts which they are required by law to do. Their agents in cases of this kind are compelled to determine their duty, and to decide between the conflicting interest of passengers and trespassers instantly and without reflection, in many cases a most difficult thing to do; and when this discretion is exercised upon reasonable grounds and in good faith, it must be considered, and is entitled to much weight in determining whether there was negligence, and consequent liability, upon the part of the company.

We do not think that the learned trial judge was as clear and accurate as he should have been in stating the conflicting duties of the company upon the facts of this case to the jury, and that the plaintiff in error was thereby prejudiced, and for this reason the judgment should be reversed, and the case remanded for a new trial.

Affirmed.

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HOME TELEPHONE COMPANY v. PEOPLE'S TELEPHONE &
TELEGRAPH COMPANY *et al.*

(*Knoxville*. September Term, 1911.)

1. **CONSTITUTIONAL LAW.** Statutes long treated as constitutional will not be declared unconstitutional except for clearest and most undoubted reasons.

When statutes have been long treated by the courts as constitutional, and important rights have been based thereon, the courts may thereafter refuse to consider the question of their unconstitutionality, and nothing could induce the courts to declare such statutes unconstitutional, except the clearest and most undoubted reasons. (*Post*, pp. 278-280.)

Cases cited and approved: *Richardson v. Young*, 122 Tenn., 471, 517; *Kelly v. State*, 123 Tenn., 516, 548; *Ferris v. Coover*, 11 Cal., 175; *Linck v. Litchfield*, 141 Ill., 469; *Nye v. Foreman*, 215 Ill., 285, 288; *Rumsey v. People*, 19 N. Y., 41, 52-58; *Kenney v. Hudspeth*, 59 N. J. Law, 504, 532, 533; *Terre Haute v. Railroad*, 149 Ind., 174, 186; *Levin v. United States*, 128 Fed. 826, 829, 63 C. C. A., 476.

2. **SAME.** Same. Acts 1885, ch. 66, has been so long treated as constitutional that it will not be now declared unconstitutional.

Acts 1885, ch. 66, has been on our statute books for more than a quarter of a century; and it has been tacitly treated by the courts, the bar, and the people as constitutional, except as to the formality of its passage settled in its favor, and many important and valuable rights have been based thereon, and nothing could induce the supreme court now to declare it unconstitutional, except the clearest and most undoubted reasons. (*Post*, pp. 278-280.)

Acts cited and construed: Acts 1885, ch. 66.

Cases cited and approved: *Telegraph Co. v. Nashville*, 118 Tenn. 1; *Vaught v. Telephone Co.*, 123 Tenn., 318.

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3. **SAME. Same. Same. Penalty imposed upon telegraph and telephone companies for refusal to transmit messages, and upon telephone companies for refusal to give applicants connections, does not render statute unconstitutional.**

Acts 1885, ch. 66, whose tenth section requires every telegraph and telephone company, under penalty of five hundred dollars for each and every refusal so to do, to transmit, over its wires to localities on its lines, such messages as may be tendered, at the customary prices, without discrimination, and whose eleventh section requires every telephone company, under penalty of one hundred dollars for each day's refusal, to supply all applicants for telephone connection with facilities without discrimination, upon their compliance with the reasonable regulations of the company, and prohibits the imposition of any restriction, which is not imposed impartially, or any discrimination by requiring that the facilities shall not be used in the business of the applicant, is not unconstitutional in any respect. (*Post*, pp. 277, 278, 280, 281.)

Acts cited and construed: Acts 1885, ch. 66, secs. 10 and 11.

4. **SAME. Same. Same. Same. Statute is not unconstitutional for excessive penalties where cumulative penalties are not recoverable, when.**

The imposition of the penalties stated in the next preceding headnote does not amount to excessive fines or unusual punishments in violation of the constitution (art. 1, sec. 16), because the penalties are not cumulative, and only one penalty for all preceding offenses can be recovered in one suit. (*Post*, pp. 280, 281.)

Acts cited and construed: Acts 1885, ch. 66, secs. 10 and 11.

Case cited and approved: *Parks v. Railroad*, 13 Lea, 1.

5. **SAME. Same. Same. Same. Same. Statute against discrimination by telegraph and telephone companies is merely declaratory of the common law.**

The statutory provisions stated in the headnote before the next preceding headnote are merely declaratory of the common law

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for the purpose of preventing discriminations, with penalties added, and they should be construed in the light of the common law, and its reasons. (*Post*, pp. 281, 282.)

Acts cited and construed: Acts 1885, ch. 66, secs. 10 and 11.

Cases cited and approved: *Vaught v. Telephone Co.*, 123 Tenn., 318; *Telephone & Telegraph Co. v. Kelly*, 87 C. C. A., 268.

6. TELEGRAPHS AND TELEPHONES. Common carriers of intelligence, without partiality or discrimination.

Telephone and telegraph companies are common carriers of intelligence, and must give the same service on the same terms to all who apply therefor, without partiality, or unreasonable discrimination. (*Post*, p. 282.)

Cases cited and approved: *Telegraph & Telephone Co. v. Delaware*, 2 C. C. A., 1; *Missouri v. Telephone Co.* (C. C.), 23 Fed., 539; *Telegraph Co. v. Telephone & Telegraph Co.* (C. C.), 177 Fed., 726; *Telephone Co. v. Telephone Co.*, 61 Vt., 241; *State v. Telephone Co.*, 17 Neb., 126; *Telegraph Co. v. Telegraph Co.*, 56 Barb. (N. Y.), 46; *Telegraph Co. v. State*, 118 Ind., 194; *Cogdell v. Telegraph Co.*, 135 N. C., 431; *Danaher v. Telegraph & Telephone Co.*, 94 Ark., 533.

7. TELEPHONE COMPANIES. One telephone company is not bound to permit another telephone company to make physical connection with its lines and switchboards.

The rule stated in the next preceding headnote does not mean that a telephone company is bound to permit another telephone company to make a physical connection with its lines and switchboards for the purpose of using them as its own subscribers use them. (*Post*, p. 282.)

8. SAME. Same. It is neither so bound under the common law, nor under Acts 1885, ch. 66, secs. 10 and 11.

Neither under the common law, nor under Acts 1885, ch. 66, secs. 10 and 11, is a telephone company bound to permit another telephone company to make a physical connection with its lines

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and switchboards for the purpose of using them as its own subscribers use them, though doubtless the legislature could enact a law authorizing the condemnation of such a right, under the eminent domain law, upon the payment of just compensation therefor. (*Post*, pp. 282- 283, 286, 287.)

Acts cited and construed: Acts 1885, ch. 66, secs. 10 and 11.

Cases cited and approved: State, ex rel., v. Cadwallader, 172 Ind., 619, 629-636; Telephone Co. v. Telephone Co. (C. C.), 155 Fed., 207.

9. **SAME.** Each telephone company is independent of all others, save to receive and forward their messages.

Each telephone company is, under the common law, independent of all other telephone companies, save for the duty to receive and forward, to any point on its line, messages received from other telephone companies, and is not bound to accord to any other telephone company or its patrons connection with its switchboards on an equality with its own patrons. (*Post*, pp. 283, 284.)

Case cited and approved: State, ex rel., v. Cadwallader, 172 Ind., 619.

10. **SAME.** Physical connection with lines and switchboards for an indefinite time may be severed by the owning company without the other's consent.

A physical connection made by one telephone company with the lines and switchboards of another company, under a contract for an indefinite time, or without the specification of any time for it to run, will not prevent the owning company from severing such connections; for the joint concurrence of the companies so in combination is not prerequisite to the severance of such connection. (*Post*, pp. 282-286.)

Case cited and disapproved: State, ex rel., v. Cadwallader, 172 Ind., 619, 640, 641.

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11. **SAME.** Physical connection given to one company does not confer such right upon other companies.

A joint traffic arrangement between two telephone companies giving one of them the right of physical connection with lines and switchboards of the other will not confer such right upon other companies not parties to the contract. (*Post*, pp. 284-286.)

Case cited and approved: Railroad v. Railroad, 110 U. S., 667.

Case cited and disapproved: State, ex rel., v. Cadwallader, 172 Ind., 619, 640, 641.

12. **SAME.** Same. Such rule would be the taking of property for public use without compensation and without due process of law.

To give to a contract between two telephone companies for physical connection with the lines and switchboards of one of them, for an indefinite time, the effect of requiring such connection to continue at the will of the connecting company, upon the payment of the toll originally stipulated, would be the taking of property for public use without compensation, and without due process of law. (*Post*, pp. 284, 285.)

Constitution referred to: State const., art. 1, secs. 8 and 21; U. S. const., 5th and 14th ams.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
WILL D. WRIGHT, Chancellor.

SHIELDS, CATES & MOUNTCASTLE and POWERS &
THORNBURG, for complainant.

LUCKY, FOWLER & ANDREWS, for defendants.

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MR. JUSTICE NEIL delivered the opinion of the Court.

The complainant is a telephone corporation having its chief office at Morristown, in Hamblen county, Tenn., with lines running into various surrounding counties. The two defendants are likewise telephone corporations; the first named having its chief office at Knoxville, with lines running through Knox county, and into various other counties; the second named has its chief office at Jefferson city, in Jefferson county, also with outrunning lines.

The complainant prior to the present litigation constructed an extension of its line from Morristown to within one mile of Jefferson city. From the latter point the Citizens' Telephone Company extended its line to meet complainant's line; and so the two were connected. The Citizens' Telephone Company is also connected at Jefferson City with the People's Telephone & Telegraph Company, but the latter is not connected with the complainant.

The purpose of the present bill is to compel the two defendants to make an electrical connection at Jefferson City between the complainant and the defendant People's Telephone & Telegraph Company through the Citizens' Telephone Company, so as to give to the complainant the benefit of the lines of the two defendants, in order that any patron of the complainant on any of its lines can, through the switchboards at Morristown, Jefferson City, and Knoxville, talk with any person he or she may desire on the lines of either of the two defendants;

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that is, to secure for the complainant the effect of a consolidation of the three lines.

It appears from the bill and from the evidence that there is an operating agreement between the two defendants for an interchange of business whereby each can use the lines of the other at an agreed rate for messages or conversations; the rate fixed for a conversation of five minutes from Jefferson City to Knoxville being ten cents. The complainant insists that on the payment of this rate it is entitled to have its lines connected with the two defendants, to the end that it may use the line of the People's Telephone & Telegraph Company into Knoxville, and all other points served by that company.

It appears that patrons of the complainant living at Morristown, and other points served by the complainant's line, called the exchange at Jefferson City for the purpose of conversing with parties at Knoxville, but that the Citizens' Telephone Company, under the direction of the People's Telephone & Telegraph Company, declined to make the required connection with the latter, although complainant tendered ten cents for each message so offered and refused. The service was offered to the complainant of having its messages transmitted or repeated to Knoxville, but this was refused, complainant insisting that it had, under the law, a right to a through connection with Knoxville over the defendants' lines, so that one could talk directly from Morristown to the desired party in Knoxville.

It is insisted on behalf of the complainant that it is entitled to the right claimed under sections 10 and 11

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of chapter 66 of the Acts of 1885. It also insists that, inasmuch as the Citizens' Telephone Company is accorded by the People's Telephone & Telegraph Company the right to use the lines of the latter into Knoxville, a refusal to permit to complainant the same right on the same terms is an unlawful discrimination and in violation of the common law, as well as of the statute.

The sections of the statute above referred to are as follows:

"Sec. 10. Every telegraph or telephone company doing business in this State, must, under penalty of five hundred dollars for each and every refusal so to do, transmit over its wires to localities on its lines for any individual, or corporation, or other telegraph or telephone company, such messages, dispatches, or correspondence as may be tendered to it by, or to be transmitted to any individual or corporation, or other telegraph or telephone companies, at the price customarily asked and obtained for the transmission of similar messages, dispatches, or correspondence without discrimination as to charges or promptness; the penalty herein prescribed shall be recoverable in any court through proper form of law, one-half of which shall go to the prosecutor and one-half to the State.

"Sec. 11. Every telephone company doing business within this State, and engaged in a general telephone business, shall supply all applicants for telephone connection with facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company, and

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no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

A preliminary question is raised to the effect that the act above referred to is void because in violation of the constitution of this State on several grounds stated.

This act has been on our statute books for more than a quarter of a century. It has been tacitly treated by the court, the bar, and the people of the State as constitutional, except on a ground directed to the formality of its passage settled in 118 Tenn., 1, 101 S. W., 770, *infra*, and many important and valuable rights have been based thereon, and nothing could induce us now to declare it unconstitutional, except the clearest and most undoubted reasons. The act has been often before the court in cases arising under it, and has been applied in more than one reported case. *Telegraph Co. v. Nashville*, 118 Tenn., 1, 101 S. W., 770; *Vaught v. East Tennessee Telephone Co.*, 123 Tenn., 318, 130 S. W., 1050. It is a doctrine of the law that when acts have been long

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treated by the court as constitutional, and important rights have been based thereon, it may refuse to further consider the question. *Kelly v. State*, 123 Tenn., 516, 548, 132 S. W., 193; *Richardson v. Young*, 122 Tenn., 471, 517, 125 S. W., 664. We shall add a few other illustrations. In *Ferris v. Coover*, 11 Cal., 175, it was held that courts would not inquire into the constitutionality of an act, if, by a long line of adjudications and by the acts of the government, it had been treated as constitutional; in *Linck v. Litchfield*, 141 Ill., 469, 477, 31 N. E., 123, that the validity of an act relating to the organization of cities and villages which authorized a city to adopt a certain article by ordinance without requiring the vote of the people, even if originally doubtful, had been determined by direct and incidental recognition for twenty years, and was not an open question; in *Rumsey v. People*, 19 N. Y., 41, 52-58, that after the organization of a county, and its general recognition throughout the government of the State, and after it had been represented in several sessions of the legislature, it was contrary to public policy to hold such organization void on account of the want of power to erect such a county; in *Kenney v. Hudspeth*, 59 N. J. Law, 504, 532, 533, 37 Atl., 67, that where for more than a generation every department of the government had construed contradictory provisions of the constitution of the State as conceding to the legislature power to reduce the number of judges of the court of common pleas whenever, in its opinion, the public good required it, this construction would be binding; in *Nye v. Foreman*, 215 Ill., 285, 288,

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74 N. E., 140, that in view of the fact that the constitution of 1870 of the State of Illinois, art. 10, section 7, providing that the county affairs of Cooke county should be managed by the board of commissioners, etc., had long been construed by both executive and legislative departments of the State government as giving the board of commissioners power to make appropriations from the funds of the county to pay assistants to the State's attorney, that construction should be acquiesced in by the courts; in *Levin v. U. S.*, 128 Fed., 826, 829, 63 C. C. A., 476, that the contemporaneous construction of a constitutional provision by those who framed it, and by statesmen, legislators, and judges, and the acquiescence of all departments of the government in such interpretation for a hundred years, conclusively determined the meaning of the provision; in *City of Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind., 174, 186, 46 N. E., 77, 37 L. R. A., 189, that, where a construction of the constitution by the legislature had been acquiesced in for forty years, it would not be disturbed.

We have, however, considered on their merits the various points made in the brief of counsel against the constitutionality of the act, and we are of the opinion that all of them should be overruled. We deem it unnecessary, in view of what has been said, to incumber this opinion with a detailed statement of the points referred to or of our reasons for overruling them. They are such as have been many times examined and discussed in our reported cases, save one. This we shall mention briefly. It is that section 10 of the act is void

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because of its penalty clause. This, it is said, makes the act violative of section 16 of article 1 of the constitution of this State, which provides: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It appears that the complainant in the present case has sued for \$16,500, an accumulation of penalties, for various alleged violations of the tenth section. The act would be void on the ground stated if it justified such heaping up of penalties, which are in effect but fines, because such accumulation would in no long time destroy the enterprises against which the fines are leveled. It was not intended that this and other statutes of the kind should be used for speculative purposes. It is the duty of the party complaining to sue for the first violation, in order that the company or person attacked may have due notice of the complaint, and an opportunity of complying, as held in *Parks v. R. R. Co.*, 13 Lea. 1, 49 Am. Rep., 655. So construed, the section referred to is not unconstitutional.

We come now to the question whether there was an unlawful discrimination against the complainant.

Sections 10 and 11 do not support the claims asserted in complainant's bill.

Those sections are merely declaratory of the common law for the purpose of preventing discriminations (*Vaught v. East Tenn. Telephone Co.*, 123 Tenn., 318, 130 S. W., 1050, 31 L. R. A. [N. S.], 315; *Cumberland Telephone & Telegraph Co. v. Kelly*, 160 Fed., 316, 87 C. C. A., 268), with penalties added; and should be con-

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strued, as held in those cases, in the light of the common law, and its reasons.

Telephone and telegraph companies are common carriers of negligence, and must give the same service on the same terms to all who apply therefor, without partiality or unreasonable discrimination. *Delaware & A. Telegraph & Telephone Co. v. Delaware*, 50 Fed., 677, 2 C. C. A., 1; *Missouri v. Bell Telephone Co.* (C. C.), 23 Fed., 539; *Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co.* (C. C.), 177 Fed., 726; *Com. Union Tel. Co. v. New England Tel. Co.*, 61 Vt., 241, 17 Atl., 1071, 5 L. R. A., 161, 15 Am. St. Rep., 893; *State v. Nebraska Telephone Co.*, 17 Neb., 126, 22 N. W., 237, 52 Am. Rep., 404; *United States Telegraph Co. v. Western Union Telegraph Co.*, 56 Barb., (N. Y.), 46; *Central Union Telegraph Co. v. State*, 118 Ind., 194, 19 N. E., 604, 10 Am. St. Rep., 114; *Cogdell v. Western Union Tel. Co.*, 135 N. C., 431, 47 S. E., 490; *Danaher v. Southwestern Telegraph & Telephone Co.*, 94 Ark., 533, 127 S. W., 963, 30 L. R. A. (N. S.), 1027. But this does not mean that a telephone company is bound to permit another telephone company to make a physical connection with its lines for the purpose of using them as its own subscribers use them. There is a wide difference between a telephone company's transmitting to any point on its line equally and indiscriminately the messages of all companies that offer them and are willing to pay the same fare for the same service, and admitting such outside companies or their patrons to the same use of its lines, that its own patrons are entitled to. The supreme

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court of Indiana, however, in a case cited, and strongly relied on by complainant, has taken what we regard as an extreme view of the common-law obligations of such companies. *State, ex rel. v. Cadwallader*, 172 Ind., 619, 87 N. E. 644, 89 N. E. 319. After laying down in forcible language the principle that each telephone company is independent of all others, and that no telephone company can under the common law compel another to admit it to connection with the latter's switchboard, that such right is a privilege to be obtained by contract or by a proper statute, and that the opposite view would result in confiscation (*Id.*, 629-636 of 172 Ind., 87 N. E., 319), that court goes further, and holds that, if a telephone company make a contract for an indefinite time with some third company whereby such access is given, it loses its independent *status*, that it cannot withdraw, and it must as a common-law duty accord the same privilege, on the same terms, to any other telephone company similarly situated, to the extent of the capacity of its exchange (*Id.*, 640, 641 of 172 Ind., 87 N. E., 644, 89 N. E., 319).

The case just referred to correctly holds, as we understand the law, that each telephone company under the common law is independent of all other telephone companies, save for the duty to receive and forward to any point on its line messages received from such other company or companies, and hence that it is not bound to accord to any such outside organization or its patrons connection with its switchboard on an equality with its own patrons; that such connection is a privilege to be

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accorded only as the result of contract, or in obedience to a statute. We concur in the reasoning that an opposite rule would soon result in the practical confiscation of the larger plants having long-distance lines, since the motive would be insistent and irresistible in small companies organized for the purpose, or depleted and run down companies, to demand such connection; the maintenance of the long lines being without expense to them. But we are unable to agree with the supreme court of Indiana that, if a contract for such connection be once made without the specification of any time for it to run, this connection cannot thereafter be severed without the joint concurrence of the companies so in combination; nor are we able to see how the exercise of the right of contract to effect such a joint traffic arrangement between two companies can confer any right upon other companies, not parties to the contract, to a participation in its benefits. Such a rule, while in terms asserting the independent right of contract, denies its existence in fact. Moreover, it enables one company to take the property of another for public use without compensation, and deprives the latter company of its property without due process of law, in violation of the constitution of this State and of the United States.

A question closely similar was presented in *Atchison, etc., R. R. Co. v. Denver, etc., R. R. Co.*, 110 U. S., 667, 4 Sup. Ct., 185, 28 L. Ed., 291. In that case it appeared that the Atchison, Topeka & Santa Fe Railroad Company and the Denver & Rio Grande Railroad Company had established a junction and a joint station. Subse-

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quently the Denver & New Orleans Railroad Company effected a junction with the Atchison, Topeka & Santa Fe Railroad Company, and then insisted that it, too, was entitled to a joint station, and that the failure to comply with this demand was an unjust discrimination against it. Speaking to this question, the supreme court of the United States said: "A railroad company is prohibited, both by the common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are and always have been proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce in its own appropriate way the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation. In the pres-

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ent case the Atchison, Topeka & Santa Fe and the Denver & Rio Grande Companies formed their business connection and established their junction or joint station long before the Denver & New Orleans Road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fe Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fe continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop at the junction of the Denver & New Orleans was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be, in effect, to declare that every railroad company which forces a connection of its road with that of another company has a right under the constitution or at the common law to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow as a necessary consequence from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities."

In Montana there is a provision by statute under the constitution of that State for connections between telephone companies upon the payment of compensation asserted under the right of eminent domain. Under such provision it was held in *Billings Mutual Telephone Co.*

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v. *Rocky Mountain Bell Telephone Co.* (C. C.), 155 Fed., 207, that a telephone company operating a local exchange, on payment of compensation to be ascertained as provided by the statute, could require another company operating long-distance lines to permit a connection with such lines, and also their use by receiving and forwarding messages through such connection from subscribers of the other company substantially as it did messages tendered by its own local subscribers.

Our act of 1885, *supra*, contains no such provisions nor have we knowledge of any other statute in this State that does, though doubtless the legislature could enact such a law if it deemed the public good required it.

We are of the opinion on the grounds above stated that the defendant companies acted within their rights when they refused to yield to the complainant company the intimate connection it demanded.

It results that the chancellor committed no error in dismissing the bill, and his decree is affirmed.

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THE EMPLOYERS' INDEMNITY COMPANY v. D. H.
WILLARD *et al.*

(*Knoxville*. September Term, 1911.)

1. **CHANCERY PRACTICE.** Decree overruling plea in abatement to jurisdiction is not a final decree passing upon the merits.

A decree overruling a plea in abatement to the jurisdiction of the chancery court is not a final decree, and does not pass upon the merits in any particular. (*Post*, p. 290.)

2. **APPEALS.** Final decree is defined in the sense entitling loser to appeal as of right.

A final decree, in the sense that an appeal as a matter of right lies from it, is one that disposes of the entire merits of the case. (*Post*, p. 290.)

Case cited and approved: *Younger v. Younger*, 90 Tenn., 25, and citations.

3. **SAME.** Discretionary appeal does not lie from decree overruling plea in abatement to jurisdiction of chancery court.

An appeal in the chancellor's discretion does not lie from a decree overruling a plea in abatement to the jurisdiction of the chancery court, because not within the terms of the statute authorizing such appeals, which are limited to the cases therein enumerated. (*Post*, pp. 290, 291.)

Code cited and construed: Sec. 4889 (S.); sec. 3874 (M. & V.); sec. 3157 (T. & S. and 1858).

Cases cited and approved: *Hume v. Bank*, 1 Lea, 220; *Barksdale v. Butler*, 6 Lea, 454; *Bomar v. Hagler*, 7 Lea, 84; *Sigler v. Vaughn*, 11 Lea, 155; *Younger v. Younger*, 90 Tenn., 25.

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FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.
—T. M. McCONNELL, Chancellor.

SHIELDS, CATES & MOUNTCASTLE and BURKETT, MILLER & MOORE, for complainant.

CHAMBERS & COOPER and WILLIAMS & LANCASTER, for defendant.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

The defendant, Willard, is a resident of Washington county, and the complainant company is a foreign corporation doing business in this State, after complying with the laws in respect thereto. Willard had brought suit in the law court at Johnson City against the company to recover damages for an alleged breach of contract, and while this suit was pending, the company filed the bill in this case against Willard and others in Hamilton county, seeking, among other things, to enjoin the suit pending in Washington county and have a complete settlement of all the matters existing between it and all of the defendants in this suit. Each of the de-

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fendants filed pleas in abatement to the jurisdiction of the chancery court of Hamilton county, and, after different motions and amendments, issue was finally joined upon the pleas, and upon the proof the chancellor overruled these and sustained his jurisdiction. The decree then recites as follows:

“And the chancellor being of opinion that it is proper to allow an appeal at this time, the same is allowed to such of the defendants as desire to avail themselves thereof upon giving bond for said appeal as required by statute. But defendants, Willard, Fisher, Miller, and The United States Fidelity & Guaranty Company do not appeal from that part of the decree allowing them twenty days in which to make further defense in case they are cast in this appeal.”

This appeal must be dismissed because it is premature. This is not a final decree, nor is it an appeal that lies within the discretion of the chancellor under section 4889 of Shannon's Code. A final decree, in the sense that an appeal as a matter of right lies from it, is one that disposes of the entire merits of the case. *Younger v. Younger*, 90 Tenn., 25, and cases cited.

A decree overruling a plea in abatement to the jurisdiction does not pass upon the merits in any particular.

By section 4889 of Shannon's Code, the chancellor may in his discretion allow an appeal from “his decree determining the principle involved and ordering an account or a sale or partition, before the account is taken, or the sale or partition is made; or he may allow such appeal on overruling a demurrer; or he may allow any

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party to appeal from a decree which settles his right, although the case may not be disposed of as to others."

It has uniformly been held by this court that the chancellor's discretion in allowing appeals under this section of the Code is limited to the cases therein enumerated. Manifestly, this appeal is not either of those cases and it is therefore premature. *Younger v. Younger*, 90 Tenn., 25; *Sigler v. Vaughn*, 11 Lea, 135; *Bomar v. Hagler*, 7 Lea, 84; *Barksdale v. Butler*, 6 Lea, 454; *Hume v. Bank*, 1 Lea, 220. The appeal is dismissed at the cost of the appellant.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1911.

C. C. SLAUGHTER, *Receiver*, v. LOUISVILLE & NASHVILLE
RAILROAD COMPANY.

(Nashville. December Term, 1911.)

1. **BANKRUPTCY.** Receiver may be authorized by decree to sue for debts due the bankrupt.

A decree in bankruptcy, authorizing a receiver to institute suit to collect any indebtedness due the bankrupt or receiver, authorizes him to sue a common carrier for the value of freight lost by negligent handling. (*Post*, pp. 293-295.)

2. **SAME.** Same. Decree in federal court authorizing trustee to sue for debts due the bank cannot be collaterally attacked in the State courts.

A decree in bankruptcy, authorizing a receiver to institute suit to collect any indebtedness due the bankrupt or receiver, is not subject to collateral attack in a suit by him in a State court against a common carrier for the value of freight lost by negligent handling, even if such decree was, by the federal district court, based upon an erroneous construction of the bankruptcy act as to the powers which may be conferred upon receivers in bankruptcy; for the State courts do not sit as reviewing courts in bankruptcy, and they have no jurisdiction to revise the orders of the district court of the United States in such matters. (*Post*, pp. 295-301.)

Cases cited and approved: Railroad v. Ferry Co., 108 U. S., 18;
Central Trust Co. v. Seasongood, 130 U. S., 482; Barbour v.

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Bank, 45 Ohio St., 133; Attorney-General v. Insurance Co., 77 N. Y., 272.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

STOKES & STOKES, for complainant.

F. M. BASS and JNO. BELL KEEBLE, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by the complainant, as receiver in bankruptcy of the Tennessee Packing & Stockyards Company, to recover from the Louisville & Nashville Railroad Company the value of a car load of meat intrusted to said railroad and alleged to have been negligently handled, and lost.

The shipment was made by the packing company prior to the beginning of the bankruptcy proceedings against it, and the suit was brought prior to any adjudication of bankruptcy.

A demurrer was filed to the bill, which challenges the right of a receiver in bankruptcy to bring a suit of this character; the point being that such a receiver is merely a caretaker or custodian, with no authority, under the bankruptcy act, to maintain plenary suits, and that proceedings of this sort can only be instituted by the trustee in bankruptcy, when duly elected. This demurrer was overruled, and an appeal taken to this court.

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It appears that, shortly after the petition in bankruptcy was filed, the complainant and one Hawkinson were appointed receivers of the company. Later Hawkinson resigned, and complainant alone was continued in charge as receiver. Still later than this an application appears to have been made to the bankruptcy court, or district court of the United States, to enlarge the powers of complainant as receiver of this company. Acting upon this application, that court pronounced the following decree:

“This cause came on for final (?) hearing upon motion of counsel for C. C. Slaughter, receiver of the Tennessee Packing & Stockyards Company, to enlarge and increase the powers and duties of said receiver; when the court is of opinion that said motion should be allowed. It is accordingly adjudged and decreed by the court that the powers and duties of C. C. Slaughter, as receiver of the Tennessee Packing & Stockyards Company, be, and they are, enlarged and increased, so that, as receiver, he is authorized and directed, whenever necessary, to institute suit to collect any indebtedness that may be owing to the Tennessee Packing & Stockyards Company or said Slaughter as receiver thereof, and that he be further authorized and directed to take any and all steps that may be necessary looking to the recovery of and placing in his possession any property of any kind belonging to the said Tennessee Packing & Stockyards Company.”

It must be conceded that it was the purpose of the bankruptcy court, by this decree, to confer on the com-

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plainant, as receiver, authority to bring suits such as the one at bar. This proposition is not controverted by counsel for the defendant. Manifestly, the language of the decree authorizes suits of this character to be brought by the receiver.

It is urged, however, on behalf of the defendant, that the bankruptcy court has no power to confer upon a receiver in bankruptcy authority such as was attempted to be given this one by the decree quoted. It is said that the bankruptcy act, in providing for receivers and their duties, limits their powers as before indicated, and that the court, acting under the statute, could not go beyond its provisions and lawfully clothe this officer with such authority as here attempted with respect to the bankrupt estate. The argument is that the collection and administration of the estate, particularly the bringing of plenary suits, are duties placed upon the trustee in bankruptcy by the act of congress, and authorities are cited in support of this view.

The sections of the bankruptcy act respecting the power of the district courts to appoint receivers and defining the duties of the latter are as follows (chapter 2, section 2) :

Subsec. 3: "Appointing receivers or marshals upon application of parties in interest, in case the court shall find the appointment absolutely necessary for the preservation of the estates, to take charge of the property of the bankrupt after the filing of the petition and until it is dismissed or the trustee is qualified."

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Subsec. 5. "Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustees, if necessary in the best interests of the estates, and allow such officer additional compensation for such services, as provided in section 48 of this act."

Subsec. 7: "Cause the estates of bankrupts to be collected, reduced to money and distributed; and to determine controversies in relation thereto, except as herein otherwise provided."

It is argued for the defendant that the court was empowered, under subsec. 5, to appoint a receiver to conduct the business of the bankrupt for a limited time, and that it is manifestly impossible for a receiver to continue a business without collecting funds due and owing to the business, and the right to make these collections and bring suit to enforce them is necessarily implied from the authority to conduct the business.

The decisions of the inferior courts of the United States throughout the country do not appear to be in entire harmony as to the proper interpretation of these sections, although it is fair to say that the weight of authority seems to sustain the position of the defendant. It must be remembered, however, that we do not sit as a reviewing court in bankruptcy, and we have no jurisdiction to revise the orders of the district court of the United States in such matters. Much of the argument, therefore, made for defendant, that would have great weight if we sat as an appellate court in bankruptcy reviewing this order, cannot be considered by us at all.

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As previously observed, the decree of the bankruptcy court undoubtedly conferred upon the complainant authority to bring and maintain this suit. Can we in this proceeding go behind this decree of a court of paramount jurisdiction in such matters and collaterally question the receiver's authority? Defendant's contention is nothing more or less than a collateral attack upon the decree of the district court of the United States authorizing its receiver to bring suits of this character.

Mr. High has observed that:

"The general principle, applicable to all judicial proceedings, that the propriety of an order or decree made in a cause in which the court has jurisdiction cannot be challenged collaterally, applies with equal force to an order appointing a receiver, made by a court of competent jurisdiction. And when a court having jurisdiction of the parties and of the subject-matter appoints a receiver over the property or funds in controversy, the validity of such an appointment and the propriety of the order cannot be successfully challenged in a collateral suit or proceeding." High on Receivers (4th Ed.), section 39a.

Numerous applications of this doctrine are contained in the same work in section 39b.

The same author says:

"It follows, therefore, in an action instituted by a receiver in matters connected with the trust, as to obtain possession of funds belonging to him in his official capacity, if proper record evidence of his appointment is produced, it will be regarded as conclusive upon the

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question of the receiver's right. The court proceeds in such a case upon the ground that it is immaterial whether the appointment was proper or improper in the first instance, and while it remains a subsisting order of a court of competent jurisdiction it is not to be questioned, unless by appropriate proceedings to test its validity." *Id.*, section 203.

Illustrating the extent to which the courts have gone in applying this rule, we quote the following language from the supreme court of Ohio:

"Unless it appears manifestly clear to us that the order of appointment was an absolute nullity, by reason of the entire absence of jurisdiction in the court that made it, it cannot be assailed in this proceeding." *Barbour, Receiver, v. Nat. Exchange Bank*, 45 Ohio St., 133, 12 N. E., 5.

The New York court of appeals has said:

"If the decree was improvidently granted, or if for any reason it should be set aside or modified, relief can be had, upon application, by any parties in interest, to the court by which it was made; but the regularity of the appointment of the receiver cannot be questioned by any other tribunal." *Attorney-General v. Guardian Mutual L. Ins. Co.*, 77 N. Y., 272.

This is the universal rule, and many authorities are cited by Mr. High in support of the text quoted.

So it is that the validity of a receiver's appointment, or the propriety of his appointment, or, in our opinion, the scope of his authority prescribed in the order of his appointment, cannot be questioned in another tribunal,

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unless the order or decree was void. All such attacks must be made in the court appointing the receiver, or in one having revisory jurisdiction over the action of that court.

It cannot be successfully urged that this decree of the bankruptcy court, conferring these powers upon its receiver, is a void decree, and for this reason subject to collateral attack. There is no question but that the bankruptcy court had jurisdiction of the subject-matter and of the parties necessary to authorize a decree appointing this receiver and prescribing his duties.

If, in undertaking to define the powers of the receiver, the court went beyond what defendant conceives to be the sanction of the act of congress, still, at most, this is merely a matter of construction. A decree of a court of competent jurisdiction is not void or a nullity merely because it erroneously or improperly construes a legislative act. Although another court may be of opinion that a co-ordinate court has improperly construed an act, even if it entertains that opinion, such other court cannot permit a collateral attack upon a judgment or decree merely because it is based on such construction.

Upon this subject it is said:

“A judgment at law cannot be impeached collaterally in equity. And, conversely, the validity of a decree rendered by a court of equity cannot be impeached in a collateral action at law. A judgment of a State court, no question as to its jurisdiction being involved, cannot be overhauled or corrected in a collateral proceeding in a federal court. The courts of the United States cannot

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lawfully treat as nullities the judgments of the courts of the several States, rendered in suits where the latter have jurisdiction of the cause and the parties, even if they are founded upon an erroneous construction of the bankruptcy act or any other statute of the United States. The remedy for the correction of the error is by writ of error to the supreme court of the United States. And it is equally clear that the reverse of this rule must hold good; that is, that the judgments and decrees of the federal courts, in cases where their jurisdiction is not disputed, must be impervious to collateral assailablements in the courts of the States, although, for example, they may proceed upon an erroneous construction of a State constitution or statute." Black on Judgments, vol. 1, section 251.

See, also, the same author, section 261, to the effect that judgments cannot be collaterally attacked for errors and irregularities; a number of illustrations being given in the text.

The supreme court of the United States has held in effect that if a statute be erroneously construed or ignored by a State court, so as to violate a provision of the federal constitution, still that furnishes no ground for collateral attack upon such judgment of a State court in an inferior federal court; but the only way to attack said judgment is by proper revisory proceedings upon writ of error to the supreme court of the United States itself. *Railroad v. Ferry Co.*, 108 U. S., 18, 1 Sup. Ct., 614, 617, 27 L. Ed., 636. Other cases along the same line are *Central Trust Co. v. Seasongood*, 130 U.

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S., 482, 9 Sup. Ct., 575, 32 L. Ed., 985, and *Kittredge v. Emerson*, 15 N. H., 227.

Upon the whole case, we are of opinion that, in bringing this suit, the complainant, as receiver of the bankruptcy court, was acting within the scope of the decree of the court by which he was appointed; that this decree was made by a court having jurisdiction of the necessary parties and of the subject-matter; that it is a valid decree, and at most can be criticised only as an erroneous construction of an act of congress (as to whether it is an erroneous construction, we express no opinion); and that accordingly, under the authorities quoted, it is not subject to collateral attack in this proceeding.

It results that there was no error in the decree of the chancellor, and it will be affirmed.

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HERMITAGE HOTEL COMPANY v. ART. J. DYER.*(Nashville. December Term, 1911.*

- 1. AGENTS.** Liability on contracts made outside of the scope of their authority.

The general rule is that, if an agent makes a contract outside of the scope of his authority, he becomes personally liable, not on the contract, but for damages for a breach of an implied warrant of authority to make it; but one exception to this rule is that, where the question of authority of the agent is a mere question of law, an action for damages does not lie, in the absence of fraud, although the agent may represent that he has authority. (*Post*, p. 305.)

- 2. CORPORATIONS.** Persons dealing with them are chargeable with provisions of their charters and the general laws.

All who deal with a corporation are bound to take notice of the provisions of its charter and the general laws concerning corporations. (*Post*, p. 306.)

Case cited and approved: *Miller v. Insurance Co.*, 92 Tenn., 176.

- 3. SAME.** No implied power to purchase and hold stock in other corporations; and contract is *ultra vires* and void, when.

A corporation has no implied power to buy and hold stock in another corporation; and where such power is not specifically granted by its charter, or necessarily implied in it, or otherwise conferred by legislation, a contract by one corporation for the purchase of stock in another corporation is *ultra vires* and wholly void, and not ratifiable. (*Post*, p. 306.)

Cases cited and approved: *Marble Co. v. Harvey*, 92 Tenn., 115; *Millery v. Insurance Co.*, 92 Tenn., 176; *Clark v. Railroad*, 123 Tenn., 245.

- 4. SAME.** Agent making *ultra vires* contract under authority is not personally liable.

Where an agent, in pursuance of the authority conferred upon him by a corporation, makes an *ultra vires* contract for it, he incurs no personal liability thereon. (*Post*, p. 307.)

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5. SAME. Same. Agent not expressly binding himself personally is not liable on ultra vires contract authorized by the corporation.

Where the president of a corporation, as its president, and acting as agent for it, signed a contract for the purchase of stock in another corporation, where there was no express agreement on his part to become personally liable, and the contract was *ultra vires*, so that no implied contract can arise therefrom, there is no ground upon which he can be held to be liable upon the agreement. (*Post*, pp. 307, 308.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

P. M. ESTES, for complainant.

CHARLES C. TRABUE, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The Hermitage Hotel Company filed its original bill against Art. J. Dyer, seeking a decree against him for \$1,400, the balance due upon a subscription to the capital stock of complainant. The subscription was in writing, and a copy of it was exhibited with the bill, and is as follows:

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“\$2000.00

NASHVILLE, TENN., April 27, '08.

“For the purpose of building a new hotel, corner of Sixth avenue and Union street, in Nashville, and in mutual consideration of the signatures of each subscriber thereto, the undersigned does hereby subscribe one thousand dollars to the capital stock of the Hermitage Hotel Company, a corporation to be organized under the laws of the State of Tennessee.

“The subscription is payable as follows:

“Ten per cent. September 1, 1908; ten per cent. October 1, 1908; ten per cent. November 1, 1908; ten per cent. December 1, 1908; fifteen per cent. on the first days of January, February, March and April, respectively.

“This subscription is conditional upon the following provisions:

“That there shall be subscribed to the capital stock of this company \$3,000,000.00.

“That whenever the entire amount of \$3,000,000 shall have been subscribed, the incorporators of said company shall resign, and the stockholders shall meet and select a board of directors.

“Nashville Bridge Company.

“By ART. J. DYER, Pres.

“Address, 1232 Stahlman Building.”

Dyer answered, denying liability, on the ground that the subscription was the act of the company, and not his, and that it did not by its terms impose upon him liability as an individual. A stipulation of counsel was filed in lieu of proof, and the cause proceeded to decree, whereby the bill was dismissed, and complainant ap-

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pealed and has assigned error. That the Nashville Bridge Company is not liable for the balance on its subscription is conceded by the complainant in its bill, because there is no provision of its charter which authorizes it to subscribe for stock in any corporation, and therefore as to it the contract of subscription was *ultra vires*. But the complainant bases its suit against Dyer upon the fact that the Nashville Bridge Company has repudiated its subscription after having paid \$600 thereof, and that the defendant, who, as the agent of that company, made and signed the subscription for it, became personally liable for the balance due under the rule of the common law that, if an agent make a contract which is outside of the scope of his authority, he becomes personally liable, not on the contract, but for damages for a breach of an implied warrant of authority to make it. 10 Cyc., p. 839, and authorities cited in note 43.

But this general rule is by no means without its exceptions, and one of these is that, "where the question of the authority of the agent is a mere question of law, an action for damages does not lie, in the absence of fraud, although the agent may represent that he has authority." 10 Cyc., p. 840, and authorities there cited.

It is admitted in this record that neither the Nashville Bridge Company nor defendant, Dyer, made any representation to induce the acceptance of the subscription as to the extent of the powers of defendant to bind the company, nor as to its corporate power to subscribe for stock

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in the complainant corporation. The subscription was offered on one side, and accepted on the other, apparently without thought or investigation by any of the parties concerned as to the corporate power of the bridge company so to be bound.

“All who deal with a corporation are bound to take notice of its charter, and this may include the general laws concerning corporations.” Page on Contracts, vol. 2, section 977, and *Miller v. Insurance Co.*, 92 Tenn., 176, 21 S. W., 39, 20 L. R. A., 765.

It has also been held in this State that a corporation has no implied power to buy and hold stock in another corporation. *Marble Co. v. Harvey*, 92 Tenn., 115, 20 S. W., 427, 18 L. R. A., 252, 36 Am. St. Rep., 71. And Mr. Page, in his work on Contracts, says it is usually so held, volume 2, section 1077.

The rule is now established in this State that a corporation cannot become a stockholder in another corporation, unless by power specifically granted by its charter, or necessarily implied in it, or otherwise conferred by legislation, and that, where no such charter power exists, a contract by one corporation for the purchase of capital stock in another is *ultra vires* and wholly void, and one which could not be ratified by either party to it, because it could not have been authorized by either. *Marble Co. v. Harvey*, 92 Tenn., 115, 20 S. W., 427, 18 L. R. A., 252, 36 Am. St. Rep., 71; *Miller v. Insurance Co.*, 92 Tenn., 176, 21 S. W., 39, 20 L. R. A., 765; *Clark v. Railroad*, 123 Tenn., 245, 130 S. W., 751, and authorities therein cited.

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Where a corporation has authorized its agent to make a contract beyond its charter power, or *ultra vires*, and such contract is made by the agent, he incurs no personal liability thereon. Page on Contracts, vol. 2, section 975.

Without further discussion of the exceptions to, or limitations of, the general rule, we think it is clear that in this case the complainant was bound to take, and therefore chargeable with, notice of the lack of power in the Nashville Bridge Company to create a valid obligation by a subscription to the capital stock of the complainant; and, this being true, it results that complainant was clothed by the law with knowledge of the lack of power on the part of the defendant to bind his principal. The subscription contract advised complainant that it was not the purpose or intention of the defendant to bind himself individually for the performance of the contract; and, all this being true, it must be clear that no contract on the part of the defendant could arise by implication of law out of the facts of this case.

A contract by implication of law differs from an express contract in this: That in an express contract the parties arrive at their agreement by words, oral or written; in implied contracts they arrive at their agreement by their acts and conduct. It is clear from all the facts of this case that there was no act or conduct, on the part either of complainant or of the defendant, at the time of the execution of the subscription, from which we could conclude that either of the parties understood the defendant to be individually liable for the performance

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of the contract which he signed on behalf of the bridge company, as its president; it appearing that his conduct was wholly free from fraud.

It results that the decree appealed from must be affirmed, with costs.

Eldridge v. Hunter.

J. T. ELDRIDGE *et ux.* v. T. B. HUNTER.

(*Nashville.* December Term, 1911.)

1. **PRIVY EXAMINATION.** Of married woman is invalid, and her deed is fraudulent and void, where she erased her name before the certificate was made, and never re-signed.

The deed and privy examination of a married woman are invalid, fraudulent, and void, where she signed the deed in the absence of her husband, and her privy examination was properly taken, but, before the certificate of examination was made, and before the deed was executed by the husband, she obtained possession of the deed and erased her signature, though afterwards, the husband, in the wife's presence, executed and acknowledged the deed, and re-signed her name without her authority, and there was no further privy examination. (*Post*, pp. 311,312.)

2. **HOMESTEAD.** Of husband and wife can only be conveyed by their joint deed; separate execution; no delivery till complete.

While the homestead of the husband and wife can only be conveyed by their joint deed, they need not execute it at the same time, though it is not complete until executed by both of them, and until then there can be no valid delivery. (*Post*, p. 312.)

3. **PRIVY EXAMINATION.** Completed in form and manner prescribed by statute is necessary to valid conveyance of a married woman.

A married woman cannot make a valid conveyance of real estate, without privy examination completed in the form and manner prescribed by statute, by the indorsement, attachment, or annexation of the prescribed certificate, contemplated to be done contemporaneously with the manual execution by the married woman, which certificate is the only competent evidence of compliance with the statute. (*Post*, pp. 312, 313.)

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Code cited and construed: Secs. 3753-3755 (S.); secs. 2891-2893 (M. & V.); secs. 2076-2078 (T. & S. and 1858).

Cases cited and approved: Mount v. Kesterson, 6 Cold., 463; Rhea v. Iseley, 1 Tenn. Cases, 228; Currie v. Kerr, 11 Lea, 142; Wester v. Hurt, 123 Tenn., 508.

4. SAME. Action in taking, is quasi judicial, and can be impeached only for fraud.

The action of a notary public in taking the privy examination of a married woman to her deed of conveyance of land is quasi judicial, and can be impeached only for fraud. (*Post*, p. 313.)

Case cited and approved: Shields v. Netherland, 5 Lea, 193.

FROM OVERTON

Appeal from the Chancery Court of Overton County.
—A. H. ROBERTS, Chancellor.

E. C. KNIGHT, for complainants.

W. R. OFFICER and E. A. QUALIS, for defendant.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

Complainants, J. T. Eldridge and Amanda Eldridge, husband and wife, bring this bill to have a deed in trust upon their homestead, purporting to have been jointly executed by them, declared void for want of valid privy examination of Mrs. Eldridge, and the foreclosure of the same perpetually enjoined.

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Complainants occupied the land in controversy as a homestead, the title being in the husband, worth less than \$1,000, and the only real estate owned by them.

J. T. Eldridge purchased of the defendant certain personal property and agreed to pay therefor \$400, for which he executed his note with personal security, and further agreed that he and his wife would secure the same by a deed in trust upon his land. The conveyance was prepared by a notary public and presented to Mrs. Eldridge at her home, in the absence of her husband, and she there signed it and was properly examined touching its execution for a valid privy examination. On the next day Mrs. Eldridge went to the home of the notary public, and upon request the conveyance was given to her that she might consult her brother concerning it, and while in her possession she erased her signature. Afterwards the notary public came to the home of J. T. Eldridge, and the latter, in the presence of Mrs. Eldridge, executed and acknowledged the conveyance, and also re-signed the name of Mrs. Eldridge thereto. No privy examination of Mrs. Eldridge was then made. After this the notary public indorsed the acknowledgment of J. T. Eldridge and the privy examination of Mrs. Eldridge upon the conveyance and it was delivered.

These facts are conceded. There is some controversy whether Mrs. Eldridge authorized her husband to resign the conveyance for her; but the preponderance of the evidence is that she refused to again sign it herself, or authorize her husband to do so for her.

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We think that upon these facts there was no valid privy examination of Mrs. Eldridge, and that the certificate and deed in trust in question are fraudulent and void.

The homestead of the husband and wife can only be conveyed by their joint deed. They need not execute it at the same time; but it is not complete until executed by both of them, and there can be no delivery until this is done.

Married women cannot make a valid conveyance of real estate without privy examination, completed in the form and manner prescribed by the statutes. Signature is the least important part of the execution of a deed by them. Privy examination is the essential part, and until it is made and perfected the deed is of no force. *Mount v. Kesterson*, 6 Cold., 463; *Wester v. Hurt*, 123 Tenn., 508, 130 S. W., 842, 30 L. R. A. (N. S.), 358.

The statutes providing for the privy examination of married women to conveyances of real estate require the officer taking the examination to examine them separately and apart from the husband in regard to the free execution of the conveyance, as there prescribed, and to make a certificate in a form also prescribed, showing the result of his examination, and to indorse on, annex, or attach the certificate to the conveyance, and contemplate that this shall be done contemporaneously with the manual execution by the married woman. The privy examination is not complete until these mandatory provisions of the statutes are complied with, and the certificate, so indorsed, attached, or annexed, is the

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only competent evidence of compliance. Code, sections 2076-2078 (Shannon's Ed., sections 3753-3755); *Rhea v. Iseley*, 1 Tenn. Cas., 228; *Mount v. Kesterson*, 6 Cold., 463; *Currie v. Kerr*, 11 Lea, 142.

The action of the officer taking the privy examination is quasi judicial, and can only be impeached for fraud, as is done in this case. *Shields v. Netherland*, 5 Lea, 193.

When Mrs. Eldridge obtained possession of the conveyance from the notary public, the privy examination had not been reduced to writing and indorsed on or attached to it. It had not been executed by her husband. It was not complete or binding upon either of them. Mrs. Eldridge then had the right to refuse to proceed with the execution of the conveyance, and she did so, and erased her signature. When it was executed by the husband, and her name signed thereto by him, no further privy examination was taken, and if she had authorized her husband's action, which she did not, this attempted execution would be imperfect and invalid for this reason.

It results that the certificate showing proper execution by Mrs. Eldridge is untrue and fraudulent, and the deed in trust void, in so far as it affects the homestead of the complainants in the land in controversy, and its foreclosure to that extent will be perpetually enjoined.

Scott v. Brandon.

D. C. SCOTT v. AMZEL BRANDON.*(Nashville. December Term, 1911.)*

- 1. COSTS BONDS.** Actions, appeals, appeals in error, and writs of error may be prosecuted upon the pauper oath.

The object of the statute (section 4928 of Shannon's Code) providing that any person may commence an action (with the exception of specified actions), without giving security for costs, by taking a prescribed pauper oath, is to enable any poor person to prosecute an action without giving a cost bond (save in the cases excepted), and the right extends to appeals, appeals in error, and writs of error, which are in the nature of actions and within the purview of the statute; and the purpose is to place the weak on a level with the strong in a contest for their rights in the courts. (*Post*, pp. 316, 317, 320.)

Code cited and construed: Sec. 4928 (S.); sec. 3912 (M. & V.); sec. 3192 (T. & S. and 1858).

Cases cited and approved: *Phillips v. Rudle*, 1 Yerg., 121; *Herd v. Drew*, 9 Humph., 365; *Barber v. Denning*, 4 Sneed, 267; *Heatherly v. Bridges*, 1 Heisk., 220; *Andrews v. Page*, 2 Heisk., 634.

- 2. REPLEVIN.** Bond must be given by plaintiff, and suit cannot be instituted upon pauper oath.

A replevin suit cannot be instituted on the pauper oath, without a replevin bond, because there is a transfer of property from the defendant to the plaintiff, immediately upon the bringing of the suit, before the right of the conflicting claims is determined, and the statutory bond in replevin is required for the security of the property involved, and not for the security of the costs alone; but, after the property is secured by the giving of such bond, the action proceeds as other actions. The rule for security is founded on the natural law that one shall not wrongfully and under the color of law appropriate to himself that which belongs to another. (*Post*, pp. 317-319.)

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See Code, secs. 4928, 5131 (S.); secs. 3912, 4113 (M. & V.); secs. 3192, 3377 (T. & S. and 1858).

Case cited and approved: *Horton v. Vowel*, 4 Helsk., 622.

3. SAME. Defendant may appeal, upon pauper oath, from justice's adverse judgment; statutes construed.

Under the statute (section 5153 of Shannon's Code), authorizing an appeal by either party from a justice's judgment in replevin, upon giving bond in double the value of the property replevined, when read and construed, as it must be, in connection with the statute (section 4928 of Shannon's Code), authorizing a person to commence an action without giving security by taking the pauper oath, applies only to a plaintiff who appeals from a justice's adverse judgment in replevin, and a defendant in replevin may appeal, upon the pauper oath, from such adverse judgment. (*Post*, pp. 319-321.)

Code cited and construed: Secs. 4928, 5149-5153 (S.); secs. 3912, 4130-4134 (M. & V.); secs. 3192, 3394-3398 (T. & S. and 1858).

Case cited, distinguished, and approved: *Kincaid v. Bradshaw*, 6 Bax., 102.

FROM HUMPHREYS.

Appeal by defendant from the Circuit Court of Humphreys County to the Court of Civil Appeals, and by *certiorari* by plaintiff from the Court of Civil Appeals to the Supreme Court.—W. L. COOK, Circuit Judge.

J. F. SHANNON and J. H. BUCHANNON, for plaintiff.

H. O. CARTER, for defendant.

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MR. JUSTICE GREEN delivered the opinion of the Court.

This case is before us on petition for *certiorari* to review a judgment of the court of civil appeals.

The question presented is as to the right of an unsuccessful defendant in a replevin suit before a justice of the peace to take an appeal to the circuit court upon the pauper oath.

The circuit judge was of opinion that no such right existed. The court of civil appeals reached a contrary conclusion, and reversed the action of the trial judge. The question depends upon a proper construction of our statutes.

The acts of the legislature respecting replevin before magistrates are carried into Shannon's Code, sections 5149-5153. Section 5153 is as follows:

"Either party may appeal from the justice's judgment to the circuit court, within two days after the judgment is rendered, on giving bond in double the value of the property replevied, payable to the opposite party, conditioned to prosecute the appeal with effect, and to abide by and perform the judgment of the circuit court."

The statutory provision with reference to suits *in forma pauperis* is contained in Shannon's Code, section 4928, as follows:

"Except for false imprisonment, malicious prosecution, slanderous words, and divorce suits brought by males, any person may commence an action without

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giving security as above required, by taking and subscribing the following oath in writing: 'I, A. B., do solemnly swear that, owing to my poverty, I am not able to bear the expenses of the action which I am about to commence, and that I am justly entitled to the redress sought, to the best of my belief.' "

This court, by construction, has always extended this right to proceed upon the pauper oath to appeals, appeals in error, and writs of error; it being said that appeals, etc., are in the nature of an action, and are within the purview of the statute. *Phillips v. Rudle*, 1 Yerg., 121; *Andrews v. Page*, 2 Heisk., 634; *Barber v. Denning*, 4 Sneed, 267; *Herd v. Drew*, 9 Humph., 365; *Heatherly v. Bridges*, 1 Heisk., 220.

It will be observed that replevin suits are not excepted in Shannon's Code, section 4928, from the provisions of that act. The object of section 4928 is to enable poor persons to assert and prosecute, in our courts, their rights and claims, without being required to give a cost bond, save in the cases excepted. The policy of our law is to allow every person a complete hearing upon any controversy he may have, whether he is able to secure costs or not, unless he be asserting a claim for false imprisonment, malicious prosecution, slander, or unless he be a male claimant for divorce.

The object of the statute is to place the weak on a level with the strong in a contest for their rights in a court of justice. *Barber v. Denning*, 4 Sneed, 267.

While it is true a replevin suit cannot be instituted on the pauper oath, the reason is that in such an action

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there is a transfer of the property from the defendant to the plaintiff, immediately upon the bringing of the suit, before the right of the conflicting claims is determined. Bond is therefore required of the plaintiff; "the rule for the security," as said by the court, "being founded on the natural law that one shall not wrongfully and under color of the law appropriate to himself that which belongs to another." *Horton v. Vowel*, 4 Heisk., 622. As observed by the court in the same case, the bond in replevin suits is required for the security of the property, not for the security of the costs.

In *Horton v. Vowell*, supra, it was held that replevin could not be prosecuted *in forma pauperis*. However, the statutory bond having been given for double the value of the property at the institution of the suit, it was permissible for the plaintiff, when during the progress of the suit the costs had accumulated to a larger amount than the bond would protect, on a rule upon him for further security, to take the pauper oath. The court said:

"After the property is secured, the action, in all other respects, is nothing different from the more common forms. It is therefore a consequence that, as to such costs as exceed the penalty of the bond, the plaintiff may prosecute the suit *in forma pauperis*.

Bearing in mind, therefore, that in replevin cases bond is required for the security of the property involved, not for the security of costs, and that "after the property is secured the action does not differ from

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the more common forms," we return to the consideration of section 5153, Shannon's Code, heretofore quoted.

We do not think the provision that "bond in double the value of the property replevied" be required of parties appealing from the magistrate's judgment was intended to apply to the defendant. The appeal bond, thus provided for, just as the original bond, in replevin cases, is intended for the security of the property, not for the security of costs. Where the plaintiff appeals, it is proper that such a bond be required of him. He obtains possession of the property with the issuance of the writ, and remains in possession thereof until the suit is finally determined. Employing this extraordinary remedy, and being at all times in possession of the property, it is right that he be held under bond during the entire progress of the litigation. This is necessary for the protection of the defendant.

As to the defendant, the situation is different. He is deprived of the property at the beginning of the suit. His appeal does not restore him to possession. It could not have been intended by the legislature to require of him a bond for the protection of property not in his possession and over which he had no control.

The security of the property could in no way be affected by this appeal. It will not be supposed that the lawmakers intended to make him, on his appeal, give a bond merely for ceremony. Neither do we think it was intended to deprive such a defendant of his appeal, merely because he was not able to give bond to cover costs and damages.

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The acts carried into section 5153 and section 4928 of Shannon's Code must be construed together.

As we have seen, the intention of the legislature in passing the last-mentioned act, permitting actions *in forma pauperis*, was to place the weak on a level with the strong, and to permit a full hearing of all save a few excepted cases in all tribunals, regardless of the poverty of the litigant, and regardless of his inability to secure costs.

Bonds in replevin cases being for the security of the property involved, and, "after the property is secured, the action, in all other respects," being "in nothing different from the more common forms," it cannot be supposed that the legislature meant to require bond of a defendant, where his appeal in no way prejudiced the security of the property, and to make a distinction between a poor defendant in replevin and a poor defendant in other suits respecting costs and damages.

If we so declare the law, it would place the personal property of every poor man in the State absolutely within the power of the justices of the peace. While the great body of our magistrates are men of probity and intelligence, unfortunately there have been exceptions. Any unscrupulous man, financially able to make a replevin bond, might go before an unscrupulous or ignorant justice, and, by preferring a false claim, take away from the lowly their scanty belongings. Defendants, being unable to give bond, would be without remedy, if the contention of the petitioner here should be accepted as correct.

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Such a result was never contemplated by the legislature. This act must be construed with reference to our other law. We are of opinion, therefore, that the section of the Code quoted (Shannon, section 5153) does not deprive a defendant of the right to appeal, upon taking the oath prescribed for poor persons.

In *Kincaid v. Bradshaw*, 6 Baxt., 102, it was held that an appeal to this court cannot be prosecuted on the pauper oath by a *plaintiff* in replevin. It is obvious that there is nothing in this holding contrary to what has been herein said.

The petition for *certiorari* will be denied.

Sidoway v. Jones.

C. B. SIDOWAY v. ELLIS F. JONES.

(Nashville. December Term, 1911.)

ATTORNEY AND CLIENT. Lien of plaintiff's attorney on plaintiff's right of action is confined to plaintiff's compromise, and defendant's voluntary payment of such claim does not subject him to additional liability, when.

Under the statute (Acts 1899, ch. 243, sec. 1), giving plaintiff's attorney a lien upon plaintiff's right of action, the attorney's sole right is in the plaintiff's right of action, which he may follow into whatever the right of action is merged, but his right is entirely separable from the right of the plaintiff, and he has no direct right against the defendant; and, therefore, where the defendant paid seventy-five dollars to the plaintiff in compromise of the suit, but, upon the objection and refusal of the plaintiff to allow any part of this sum to be appropriated to the payment of the fees of his attorneys, the defendant paid an additional sum of seventy-five dollars into court under agreement for the benefit of plaintiff's attorneys, not as a part of the compromise sum paid to plaintiff in satisfaction of his right of action, but as a recognition and provision for the legal rights of the plaintiff's attorneys, which they might have enforced, if it had not been voluntarily paid, such voluntary payment does not entitle them to a lien enforceable against the defendant, on the theory that the suit was in fact compromised for one hundred and fifty dollars.

Acts cited and construed: Acts 1899, ch. 243, sec. 1.

Cases cited and approved: *Railroad v. Wells*, 104 Tenn., 707; *Tompkins v. Railroad*, 112 Tenn., 157.

Sidoway v. Jones.

FROM SUMNER.

Appeal from the Circuit Court of Sumner County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—W. L. COOK, Circuit Judge.

W. A. GUILD, D. B. PURYEAR, and J. W. MURRAY, for plaintiff.

ED. T. SEAY, for defendant.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

On the intervention of W. A. Guild, D. B. Puryear, and J. W. Murray, attorneys.

The plaintiff, Sidoway, brought suit against defendant, Jones, in the circuit court of Sumner county, through the interveners as his attorneys of record, for \$10,000 damages for alienating the affections of his wife. Concurrently with the damage suit, the interveners filed a bill in chancery for Sidoway, enjoining the transfer of about \$8,000 of defendant's personal property in aid of the suit at law.

Neither case was ever tried, but both cases were compromised by plaintiff and defendant in the follow-

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ing way: Defendant procured his attorney to draw up a written agreement, stating the terms of the compromise of the two cases, which provided, in substance, that defendant was to pay to Sidoway the sum of \$75, in consideration of which Sidoway was to dismiss the two suits above referred to, and "to pay and discharge all attorney's fees he has incurred in said suits, and release and hold harmless said E. F. Jones from any and all liens by reason thereof." Sidoway objected to that part of the compromise agreement which required him to pay all attorney's fees and exonerate Jones from the attorney's lien. Jones had previously been advised by his attorney that whatever amount he paid to Sidoway in settlement of the suit could be subjected to the payment of the fees of the attorneys of record for Sidoway. For his reason he agreed with Sidoway, upon the latter's objection to the provision of the agreement exonerating Jones from all attorney's liens, that he would pay in court, for the benefit of Sidoway's attorneys, an additional sum of \$75. He says that he had been advised by his counsel that he could be required to pay this amount, whether he agreed to do so or not. He also stated that he knew, at the time he paid \$75 to Sidoway in settlement of the case, that Sidoway's attorneys would receive no part of the money. In fact, this knowledge, according to Jones, was the inducing cause of his agreeing to pay into court the further sum of \$75 for the benefit of the interveners.

The circuit judge found the facts as above set out, and the testimony of the defendant, Jones, sustains

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his finding. He directed that the defendant, Jones, pay into court \$75 for the benefit of the interveners. The court of civil appeals modified the judgment of the circuit judge, and required the defendant to pay into court the sum of \$150 for the benefit of the interveners; Judges Hughes and Hall dissenting.

The question for determination is whether the defendant paid to Sidoway \$75 only in compromise of the suits between them, or whether the agreement was to pay \$150. Chapter 243, section 1, Acts of 1899, provides as follows:

“Be it enacted by the general assembly of the State of Tennessee that attorneys of record who begin a suit in a court of record in this State shall have a lien upon the plaintiff’s right of action from the date of the filing of the suit.”

This statute creates a new right in favor of attorneys of record who begin a suit in a court of record in the plaintiff’s right of action. The attorney’s right is entirely separable from the right of the plaintiff. It does not confer upon the attorney any right in the plaintiff’s suit. *Tompkins v. Railroad*, 112 Tenn., 157, 72 S. W., 116, 61 L. R. A., 340, 100 Am. St. Rep., 795.

A clear distinction is made between the suit which the attorney begins and the plaintiff’s right of action which the suit is brought to enforce. The plaintiff’s right is against the defendant, and the attorney’s right is against the plaintiff, and a special property in the nature of a lien is given the attorney in the right of

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plaintiff against the defendant. No relation is created between plaintiff's attorney and the defendant, and no right is given plaintiff's attorney against the defendant directly as between them. The attorney's sole right is in the plaintiff's right of action, which he may follow into whatever the right of action is merged. *Railroad v. Wells*, 104 Tenn., 707, 59 S. W., 1041.

The foregoing distinctions are clearly recognized in *Tompkins v. Railroad* and *Railroad v. Wells*, supra. In the latter case the court said:

"Now, as formerly, the plaintiff's right of action is merged in his judgment when one is rendered, and in the compromise when one is made; and the amount specified in the one or in the other is the measure of the defendant's liability."

Plaintiff's attorney's fees are no part of his right of action. As stated above, the lien in favor of the attorney upon the amount realized by the plaintiff is a new right conferred upon the attorney by the statute under consideration. The plaintiff's right against the defendant grows out of the duty which defendant owed to plaintiff and a breach of the duty. They are entirely separable, both in law and in fact.

It cannot be said that the interveners are prejudiced in any way by the agreement of the defendant to pay into court a sum equal to the sum paid Sidoway in compromise of the suit. It does not alter the case that the agreement by defendant to pay \$75 for the benefit of the interveners was a part of the compromise contract. Plaintiff and defendant both recognized at the

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time that it was no part of the sum to be paid to Sidoway in satisfaction of his right of action. It was merely recognizing and providing for the rights of the interveners. The fact that Sidoway insisted upon this, and Jones agreed to it, cannot confer a new right upon the interveners, nor extend their lien to a fund which is not a part of plaintiff's right of action.

The writ of *certiorari* is allowed, and the judgment of the court of civil appeals is reversed, and that of the circuit judge affirmed

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AMERICAN NATIONAL BANK v. NATIONAL FERTILIZER
COMPANY.

(*Nashville*. December Term, 1911.)

1. **BILLS AND NOTES.** Debtor indorsing check for conditional payment is an "indorser" entitled to notice of dishonor, when.

Where the defendant deposited with the complainant bank certain notes indorsed by it to secure its indebtedness to the bank, and, upon maturity, the maker deposited with the defendant certain collateral, in order to secure an extension of time, whereupon the defendant procured from the bank the desired extension; and later the maker gave the defendant a check on another bank, which the defendant indorsed and sent to the complainant bank for collection and application of the proceeds to said indorsed notes; but the check, without proper notice of its nonpayment, was returned to complainant partly unpaid for want of funds, it was *held* that the defendant was an "indorser" of the check, within the sense of the negotiable instruments law (Acts 1899, ch. 94, sec. 63), and as such was entitled to discharge from liability because of the complainant bank's failure to make proper demand and to give him notice of dishonor, as required by sections 71, 83, 84, 89 and 102 of said law, notwithstanding the fact that the defendant was, by reason of waiver of demand and notice, absolutely liable on the notes, for the conditional payment of which the check was given. (*Post*, pp. 331-335.)

Acts cited and construed: Acts 1899, ch. 94, secs. 63, 71, 83, 84, 89, 102.

Case cited and distinguished: *Byers v. Harris*, 9 Heisk., 652.

2. **SAME.** Notice of dishonor, but not formal protest of a check for nonpayment, is necessary; check defined.

While demand of payment must be made and notice given as required by statute, yet formal protest is not required in case

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of a check, because it is not a foreign bill of exchange, though it is a bill of exchange drawn on a bank payable on demand. (*Post*, pp. 335, 336.)

Acts cited and construed: Acts 1899, ch. 94, secs. 71, 83, 84, 89, 102, 118, 185.

Case cited and approved: *Bank v. Butler*, 113 Tenn., 574, 579.

3. **SAME.** Notice of dishonor may be given by telephone under statute authorizing written or oral notice.

Under the negotiable instruments law (Acts 1899, ch. 94, sec. 96) authorizing written or oral notice of dishonor, to be "given by delivering it personally or through the mails," the notice may be given by telephone, if it be clearly shown that the party to be notified was really communicated with, that is, fully identified as the party at the receiving end of the line. (*Post*, p. 336.)

Acts cited and construed: Acts 1899, ch. 94, sec. 96.

4. **SAME.** Oral notice of dishonor of a check, given by telephone to a clerk of an indorsing commercial corporation, is not notice to the corporation.

Oral notice of the dishonor of a check, given by telephone to a clerk of an indorsing commercial corporation, is not notice to the corporation, within the meaning of the negotiable instruments law (Acts 1899, ch. 94, sec. 97), authorizing the giving of notice "either to the party himself or to his agent in that behalf," especially where it does not appear that such clerk had communicated such notice to any one connected with the management of the business of the corporation. (*Post*, pp. 336, 337.)

Acts cited and construed: Acts 1899, ch. 94, sec. 97.

5. **SAME.** Debtor not injured for want of notice of dishonor of check indorsed as conditional payment is not entitled to credit on indebtedness.

Where a check or other negotiable paper is indorsed by the debtor to the creditor as conditional payment (or as collateral security)

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of the indebtedness, the indorser will be released from liability through the failure of the indorsee creditor to give notice of the dishonor of the indorsed paper; but the original debt will not be discharged, except to the extent injury has occurred by reason of the holder's negligence in failing to give notice of dishonor, and where it is shown that no injury resulted to the debtor by reason of such negligence, he will not be entitled to credit on his indebtedness for the amount of the unpaid check or other negotiable paper so indorsed. (*Post*, pp. 337-341.)

Cases cited and approved: *Word v. Morgan*, 5 Sneed, 79; *Betterton v. Roope*, 3 Lea, 215; *Harper v. Bank*, 12 Lea, 678; *Kirkpatrick v. Puryear*, 93 Tenn., 409; *Swinyard v. Bowes*, 5 Maule & S., 62; *Bridges v. Berry*, 3 Taunt., 130; *Hunter v. Moul*, 98 Pa., 13; *Jennison v. Parker*, 7 Mich., 355; *Anderson v. Timberlake*, 114 Ala., 377.

Case cited and distinguished: *Coleman v. Lewis*, 183 Mass., 485.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

JNO. M. GAUT and J. S. PILCHER, for complainant.

W. H. WILLIAMSON, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

This bill was filed against the fertilizer company and several individuals, its stockholders, who had guaran-

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teed an indebtedness owing by the fertilizer company to the bank. The suit was brought to obtain a recovery on three notes of \$4,000 each and one note of \$3,726.60. There were certain credits upon these notes, which are not in controversy. A judgment was rendered in favor of the complainant for \$13,938.77, which sum included interest and attorney's fees provided for in the note.

The defendant claims it was entitled to a credit of \$5,000 and the percentage of attorney's fees applicable to this sum. This \$5,000, including the attorney's fees and interest applicable thereto, aggregated, at the time the judgment was rendered below, the sum of \$7,015.54. The appeal was prayed only as to this part of the decree.

The \$5,000 item claimed as credit arose under the following circumstances: The fertilizer company had obtained a line of credit amounting to \$50,000 with the complainant bank. From time to time it had transferred to the bank, in substitution for this liability, sundry notes held by it upon its customers. Among these notes were those sued on and others, which had been executed by one J. C. Cooper to the fertilizer company, and by it indorsed to the bank. Each of these notes contained on its face a provision for waiver of demand and notice, so that, when the fertilizer company indorsed them to the bank, it became absolutely liable thereon. These notes matured, and the bank became urgent for payment. The fertilizer company in turn urged Cooper to make payment. In this state of affairs Cooper transferred as collateral to the fertilizer company sundry shares of stock which he owned in another corporation. A paper was

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executed, stating the terms under which the collateral was given. The substance of this paper was that Cooper was to pay to the fertilizer company certain sums on dates specified, and the fertilizer company was itself to grant, and also to secure from the bank, an indulgence according to these dates. In case default should occur on any of these collateral payments, and should continue for ten days, it was provided that all of the notes should again become due, and the fertilizer company would have the right to advertise and sell the collateral. One of the special payments provided for was for \$5,000, to be made on May 20, 1908. As a means of making this payment Cooper delivered to the fertilizer company his check as follows:

“Athens, Ga., May 29, 1908.

“The Georgia National Bank, of Athens, Georgia:

“Pay to the order of National Fertilizer Company,
\$5,000, five thousand and no hundred dollars.

J. C. Cooper.”

This was indorsed:

“Pay to the order of American National Bank.

National Fertilizer Co.,

“By E. W. Connel, Treasurer.”

Following this:

“Pay to the order of American National Bank, Nashville, Tenn.

“N. P. Le Sueur, Cashier.”

The indorsement made by the fertilizer company to the complainant bank was for the purpose of conditional payment; that is, when the check should be collected by

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the complainant, the proceeds were to be applied in payment that far upon the notes now sued on.

The complainant bank sent the check to the bank on which it was drawn. No funds were in that bank to meet it, but Cooper promised that bank that he would place funds with it to meet the check, and gave it certain drafts on third parties from which to obtain the money. The complainant bank was promptly notified by the Georgia bank of the condition of affairs at that end of the line, and authorized the Georgia Bank to indulge Cooper, with a view to making the collection out of the drafts which Cooper had placed in that bank. The sum of \$2,000 was in fact realized on those drafts by the Georgia bank, but no more. About thirty days having elapsed in the meantime, the Georgia bank was instructed to return the paper, and did so.

The fertilizer company insists that it was entitled to notice of the failure of the Georgia bank to pay the check, and, having received no notice, it was discharged from the check, and likewise from that amount of the notes sued on. The complainant bank insists that it gave due notice, but that, if it has failed to prove this, nevertheless defendant is not entitled to credit on the notes on which the suit is brought, even if it was released from liability on the check, on which no suit has been brought. The evidence upon the subject of notice will be stated further on.

Complainant insists that the fertilizer company was not a true indorser in the sense of the commercial law, with the obligation, rights, and duties of one occupying

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that relation, but that it indorsed simply for the purpose of transferring title; that the check really belonged to the complainant, to be credited on a debt due it when collected; hence that the rule insisted upon by the fertilizer company concerning the effect of a failure to give notice on paper transferred as conditional payment does not apply. Reference is made to the case of *Byers v. Harris*, 9 Heisk., 652. That was a case in which a factor had sold goods for his principal, and, as a means of making payment, he, pursuant to the ordinary course of business between the two, purchased a draft on New York from a bank in Memphis, having the draft made payable to himself, and indorsing it to his principal. Before the paper was presented for payment in New York the Memphis bank failed and was without funds to meet it. The owner of the draft caused it to be protected, with a view to holding his factor liable on his indorsement, and, on the latter's refusal to pay, subsequently sued him. It was held that the indorsement was without consideration, and merely for the purpose of transferring title, which the factor held really as agent of his principal, and that he was not liable. There are numerous cases to support this principle. The present case, however, does not fall under these authorities. Under the facts stated it is perceived that, while the fertilizer company was acting with the full consent of the bank in granting the extension, it was not acting as agent of the bank, but on its own initiative, and for the purpose of protecting its own liability. It then had a beneficial interest in the check, and had control of it.

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There was no contract that this check should be turned over to the American National Bank. The fertilizer company had the power to place it for collection in any other bank, or put it in any other channel for collection, that it deemed proper. Having this interest and power when it indorsed the check to the American National Bank, it was in the same situation in respect to it which it would have occupied if the check had been drawn from any source whatsoever. In other words, it was merely paper owned by the fertilizer company, which it indorsed to the bank, to be collected and applied by the latter on the notes which the fertilizer company, by a fixed liability, owed the bank; that is, as a conditional payment on those notes. The fertilizer company was therefore an indorser within the sense and meaning of section 63 of the negotiable instrument law, which reads: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." The rights of the fertilizer company were therefore to be measured by those of indorsers generally. "A check is a bill of exchange drawn on a bank payable on demand." Section 185; *Unaka National Bank v. Butler*, 113 Tenn., 574, 579, 83 S. W., 655. The indorser was entitled to have demand made in reasonable time, and on refusal of payment to have notice of dishonor, in default of which he would be discharged. Section 89; section 71; section 83; section 84; section 102. While demand must be made as stated, and notice

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given, formal protest is not required in case of a check, because it is not a foreign bill of exchange. Section 118, ch. 94, Acts of 1899.

The complainant insists that notice was given. This is denied by defendant. The treasurer of the company, Mr. E. W. Connel, who made the indorsement for the fertilizer company, testifies unequivocally that no notice was received by him. Mr. Rhea, the president, testifies to the same effect. Mr. Le Sueur, the cashier of the bank, says that he gave notice by telephone. According to section 96 of the negotiable instrument law the notice may be "in writing or merely oral," and may "in all cases be given by delivering it personally or through the mails." We are of the opinion that a notice by telephone would fall within the meaning of this section, if it be clearly shown that the party to be notified was really communicated with; that is, fully identified as the party at the receiving end of the line. In this case, however, Mr. Le Sueur is not clear that he ever held any communication with Mr. Connel. He testifies that his talks were with a clerk, whose name is not given; that he had several conversations with this clerk, in which he left word for Mr. Connel, and he *thinks* he succeeded one time in getting Mr. Connel. It is evident, however, in his testimony that he is not confident in this belief, while Mr. Connel is positive that he did not receive notice at all. It is said in section 97 that notice of dishonor may be given "either to the party himself or to his agent in that behalf." We do not undertake to define the meaning of the expression "agent in that be-

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half." We are of the opinion, however, that notice to a clerk, under the facts stated, would not be sufficient; it not appearing that he had communicated such notice to any one connected with the management of the business.

Under the facts stated the fertilizer company was undoubtedly discharged from liability on the check. The question now to be determined is whether this discharge entitled it to a credit for the amount of the check on the notes sued on; the check, as stated, having been indorsed as a conditional payment on these notes.

In Daniel on Negotiable Instruments, section 971, it is said: "So absolute is the necessity for notice to an indorser in order to charge him that, if a note has been indorsed to the holder in conditional payment of a debt, the failure to give notice to the indorser will not only discharge the indorser as a party to the note, but also as a debtor upon the original consideration, even though it be secured by a mortgage or deed of trust. The note, then, is made an absolute discharge of his liability, and the indorsee must look solely to prior parties. And so in respect to the drawer of a bill given in conditional payment. The neglect to give notice to the drawer of a renewed bill, not only discharges him from liability to pay that bill, but discharges him from liability to pay the prior bill, to satisfy which it was drawn; and this, although it be expressly agreed that the taking of such second bill shall not exonerate any of the parties to the first bill until actual payment." To the same effect are Byles on Bills, par. 230; Tiedeman on Commercial

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Paper, 334. In Edwards on Bills and Promissory Notes, section 647, it is said: "The law on this subject is founded on a reason of public expediency. There is nothing more important than that, in questions of a general mercantile nature, there should be a uniformity of decision; and although the justice and equity of the rule requiring notice may not in some cases be perceived, where the payee has purchased a bill, and it is drawn in good faith, and no conceivable loss has happened by the want of notice; yet, as there may be cases where, though there were no funds in the hands of the drawee, the drawer may be injured by the want of notice, it is better that the rule on the subject should be general and uniform throughout the mercantile world."

It is insisted in behalf of complaint that the rule stated in the passage quoted from Daniel on Negotiable Instruments does not apply in a case where it is affirmatively shown that the person making the conditional payment has received no detriment from the want of strict presentment and notice; that is, in such a case the principal demand is not extinguished.

The subject is discussed in an extended note to *Coleman v. Lewis* (Mass.), 68 L. R. A., 482-492. In *Coleman v. Lewis*, 183 Mass., 485, 67 N. E., 603, 68 L. R. A., 482, 97 Am. St. Rep., 450, a distinction is taken between indorsements made by way of conditional payment and those made by way of collateral security. Speaking to this subject it is said in that opinion: "The rule invoked by the defendant is a rule which obtains when a note is taken as conditional payment of a debt. In such

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case the condition on which the note is given and accepted is that it shall be duly presented for payment, and that if it is not so presented, and due notice of its dishonor given, the payment will become absolute. The rule is a rule of the common law, and was set forth in section 7, 3 and 4 Anne, c. 9, which was enacted to remove all doubts as to promissory notes being within the custom of merchants. It is there provided that, 'if any person accept a bill of exchange, for or in satisfaction of any former debt,' the same shall be esteemed a full and complete payment if such person 'doth not take his due course to obtain payment thereof by endeavoring to get the same accepted and paid and make his protest as aforesaid either for nonacceptance or nonpayment thereof.' . . . But we are of opinion that, where a notice is given as collateral security, the doctrine that a failure to present and give notice of dishonor operates as payment does not apply. In such a case the loss of an indorser's liability through failure on the part of the pledgee to present the note for payment and to give notice of dishonor to the indorser is material, when the defendant undertakes to recover damages for the negligence of the pledgee in his care of the collateral committed to his charge, or to set up those damages in recoupment."

It is shown in the note referred to that the distinction above mentioned is not kept up in the cases; rather that in some of the cases it is held that the rule as to conditional payment strictly obtains, and in others it is held both in this class of cases and those where collateral se-

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curity is given, that the original debt is not discharged unless it be shown that injury has occurred. Both English and American cases are cited as holding that both classes of cases are subject to the same rule. *Swinyard v. Bowes*, 5 Maule & S., 62; *Bridges v. Berry*, 3 Taunt., 130; *Hunter v. Moul*, 98 Pa., 13, 42 Am. Rep., 610; *Jennison v. Parker*, 7 Mich., 355; *Anderson v. Timberlake*, 114 Ala., 377, 22 South., 431, 62 Am. St. Rep., 105. Cases are also cited showing that the rule in both instances is that the original debt is discharged by default of the holder in making demand and giving notice. We need not undertake, in the present case, to settle the conflict, since in our own State we think the matter is already settled by our decisions. *Word v. Morgan & Co.*, 5 Sneed, 79; *Betterton v. Roope*, 3 Lea, 215, 31 Am. Rep., 633; *Harper v. Bank*, 12 Lea, 678; *Kirkpatrick v. Puryear*, 93 Tenn., 409, 24 S. W., 1130, 22 L. R. A., 785. No distinction is taken in these cases between paper transferred as collateral security and that which is used as conditional payment. The same rule is applied to both; that is, that the original debt will not be held discharged, except to the extent injury has occurred by reason of the negligence of the person holding the paper. The last case referred to was one of conditional payment. It was held that failure to exercise due diligence in the matter of presentation for payment and notice of dishonor not only discharged the indorser from the paper on which the default occurred, but *prima facie* from the original debt on which it was to be applied, and that the burden of proof would rest upon the plaintiff,

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suing on the principal debt, to show that no injury had resulted to the debtor by reason of his negligence in respect of the paper transferred as conditional payment.

In the case now in judgment it is shown that no injury resulted from complainant's failure to give notice. The chancellor, therefore, acted correctly in rendering judgment for the whole amount.

Affirm the judgment.

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SAM LEVY & CO. v. MRS. JAMES DAVIS *et al.*

(Nashville. December Term, 1911.)

- 1. EXEMPTIONS.** Of life insurance from debts of husband does not exempt same from wife's debts, when.

Under our statutes (Shannon's Code, sections 4231 and 4232), providing merely that the proceeds of a policy of insurance on the husband's life shall be exempt from liability for his debts, and having no reference to the debts of the wife herself, insurance funds received by the widow from a policy on her deceased husband's life are not exempt from debts contracted by her and for which she is personally liable. (*Post*, p. 345.)

Code cited and construed: Secs. 4231, 4232 (S.); secs. 3335, 3336 (M. & V.); secs. 2478, 2479 (T. & S. and 1858).

- 2. SEPARATE ESTATE.** Wife's interest in husband's life insurance policy is her separate estate.

The interest of a wife in policy of insurance on her husband's life is her separate estate. (*Post*, p. 345.)

Case cited and approved: *Hughey v. Warner*, 124 Tenn., 725.

- 3. STATUTES.** Must be construed so as to give every word and phrase some meaning.

In construing a statute, the courts must, if possible, give every word and phrase some meaning. (*Post*, p. 348.)

Case cited and approved: *Doty v. Telephone Co.*, 123 Tenn., 329.

- 4. SEPARATE ESTATE.** May be subjected to debts contracted by a married woman in mercantile or manufacturing business; unmarried woman cannot hold a separate estate as such.

A married woman's separate estate cannot, without an express agreement, be subjected to her general indebtedness, or debts

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not contracted in her conduct of a mercantile or manufacturing business; but under the statute (Acts 1897, ch. 82), providing that a married woman engaged in the mercantile or manufacturing business shall be liable for the debts incurred therein, as if she were a *feme sole*, her liability in the specific instance is the same as though she were unmarried, and her separate estate held by her without any limitation upon her power of disposition may be subjected to her such debts; and as an unmarried woman can hold no separate estate as such, a sum due a widow on a policy on the life of her deceased husband may be subjected to debts contracted in the course of trade, while she was living with her husband and engaged in mercantile business in her own name, without a special contract subjecting it to such debts. (*Post*, pp. 346-350.)

Code cited and construed: Sec. 4505 (S.); sec. 3505 (M. & V.); sec. 2805 (T. & S. and 1858).

Acts cited and construed: Acts 1897, ch. 82.

Cases cited and approved: *Yeatman v. Bellmain*, 6 Lea, 488; *Persica v. Maydwell*, 102 Tenn., 207.

Cases cited and distinguished: *Chatterton v. Young*, 2 Tenn. Chy., 771; *Federlicht v. Glass*, 13 Lea, 481; *Jordan v. Keeble*, 85 Tenn., 417; *Theus v. Dugger*, 93 Tenn., 41; *Woodfolk v. Lyon*, 98 Tenn., 269.

FROM MONTGOMERY.

Appeal from the Chancery Court of Montgomery County.—J. W. STOUT, Chancellor.

AUSTIN PEAY, and SAVAGE & FORT, for complainants.

F. G. GILBERT and H. N. LEECH, for defendants.

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MR. JUSTICE GREEN delivered the opinion of the Court.

Referring to the bill herein, in so far as it relates to the questions discussed in this opinion, its averments are:

From March, 1909, until the spring of 1910, Mrs. James Davis was engaged in the mercantile business in Clarksville. She was a married woman, living with her husband. During this period, while living with her husband and while engaged in trade, she became indebted to the complainants for goods bought from them for use in the conduct of her business.

Prior to this time her husband took out a policy of insurance in her favor for \$2,000. He has since died. For the satisfaction of their claim against her for goods sold to her while she was in business, the complainants seek to reach the proceeds of this policy of insurance, and have filed their bill, making Mrs. Davis and the insurance company defendants.

A demurrer to this bill was filed, one of the grounds of which was:

"The bill shows that the debts alleged in the bill as owed by the defendant are general debts, and that the funds sought to be reached and subjected to the satisfaction of said alleged general debts are derived from, and are the proceeds of, a life insurance policy on the life of the deceased husband of this defendant, in which policy she was named as the beneficiary.

"Said life insurance is exempt to her, under the statute laws of the State of Tennessee, is her separate prop-

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erty, under the laws of this State, and is not liable to the satisfaction of the debts claimed in the bill."

This demurrer was sustained by the chancellor, and from his decree an appeal was taken to this court.

It should first be observed that the debts to which the proceeds of this policy are sought to be subjected are the debts of the wife, and not the debts of the husband. Therefore the funds collected from the policy are not exempt, under sections 4231 and 4232 of Shannon's Code. These statutes merely provide that the proceeds of a policy on the husband's life shall be exempt from his debts, and have no reference to the debts of the wife herself.

So that, if the sum realized from this policy is exempt from these debts of Mrs. Davis, it must be so held, because said fund is her separate estate, and not by force of the statutes relating to insurance on the husband's life.

It may be conceded that the interest of Mrs. Davis in this policy is her separate estate. This question has been considered several times by this court, and it has been uniformly held that such a policy of insurance on the life of a husband, payable to the wife, is her separate estate. *Hughey v. Warner*, 124 Tenn., 725, 140 S. W., 1058, and cases there cited.

These mercantile debts of Mrs. Davis were incurred by her while engaged in business, without any special contract on her part to bind her separate estate for the payment thereof. It is insisted, therefore, in her behalf, that under the well-settled rule in this State this fund,

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being her separate estate, cannot be held liable for these debts, in the absence of an express contract by her to this effect.

Undoubtedly, if she had not been engaged in mercantile or manufacturing business, or had she contracted a general indebtedness otherwise than in such business, her separate estate could not be subjected to its payment without an express agreement on her part that it might be so held. This principle is too familiar to require citation of authority.

It remains, however, to consider in this case the effect of chapter 82 of the Acts of 1897. That act is as follows: "An act to be entitled an act to define the liability of married women on their contracts, when engaged in the mercantile or manufacturing business.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that when married women are engaged in the mercantile or manufacturing business in their own names, or by an agent, or as partner, they shall be liable for the debts incurred in the conduct of such business, as if they were *femme sole*, and no plea of coverture shall avail in such cases."

This act, it will be seen, declares that a married woman engaged in business shall be liable for the debts created in such business, as if a *femme sole*. It is said that, regarding her as *femme sole*, she could not hold property as a separate estate, and all the property to which she had title would accordingly be liable for her mercantile debts, whether such property was acquired as a general estate or to her separate use.

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To the contrary, it is urged on behalf of Mrs. Davis that, properly construed, this act has no such meaning as complainants ascribe to it. It is insisted that the intention of the act was only to take away the defense of coverture from a married woman engaged in the mercantile or manufacturing business; that the act prevents her from purchasing goods and escaping liability for their value because she is a married woman; that judgment can be rendered against her by reason of the act; but that such judgment stands on the same plane as any other judgment which might have been obtained against her in the absence of the statute, had she failed upon suit to interpose a plea of coverture. We are referred to the cases holding that judgments against married women cannot be satisfied out of their separate estates, unless the claims upon which the judgments were based were charges against such separate estate. *Woodfolk v. Lyon*, 98 Tenn., 269, 39 S. W., 227; *Chatterton v. Young*, 2 Tenn. Ch., 771; *Jordan v. Keeble*, 85 Tenn., 417, 3 S. W., 511.

This is a plausible construction of the statute, but we cannot agree that it is the true construction. In fact, such a construction omits from the statute an entire phrase, to wit: "As if they were *femme sole*."

Learned counsel for Mrs. Davis interpret the act as if it read, married women "shall be liable for the debts incurred in the conduct of such business, . . . and no plea of coverture shall avail in such cases." They do not take into account the important words, "as if they were *femme sole*," used to indicate the character of lia-

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bility imposed upon married women engaged in business.

The act undoubtedly renders a married woman engaged in business liable to judgment for her mercantile debts. It has been so held in *Persica v. Maydwell*, 102 Tenn., 207, 52 S. W., 145. Such, however, is not the extent of the act, unless we elide the pointed phrase heretofore referred to. It is the duty of the court, in construing a statute, if possible, to give every word and phrase some meaning. *Doty v. Telephone, etc., Co.*, 123 Tenn., 329, 130 S. W., 1053. There is no justification in authority or reason for omitting or excluding a phrase such as this one, in determining the meaning of this statute.

The act is entitled, "An act to define the liability of married women" as to certain contracts of theirs; that is to say, the purpose of the act is to declare in what manner, and how, married women shall be held in reference to certain of their obligations. The plainest language of the statute is that, with reference to debts incurred by them in the conduct of a mercantile or manufacturing business, they shall be held liable "as if they were *femme sole*."

The six words just quoted constitute the dominant phrase of the entire passage. More clearly and strongly than any other language used do they express the legislative intent. There is no escape from the force of these words, and, if effect be given them, the conclusion we herein reach is inevitable.

The act means, not only what defenant's counsel assert, but it means more. It means, not merely that mar-

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ried women in business are liable to judgment on the debts, but it means, also, that their property shall be liable for these debts in every way, just as if they were unmarried women.

An unmarried woman, as a matter of course, can hold no separate estate as such. All her property to which she has title is subject to her debts.

If we are to treat married women, in respect to their business obligations, when they engage in trade, as *femmes sole*, it follows that, as to debts so incurred, they hold their property just as if they were unmarried, and it is not necessary for them to enter into any especial contract to bind this property for their obligations of this character in order to render it liable, even though it was acquired by them as separate estate.

We can arrive at no other conclusion without ignoring or giving an unnatural construction to chapter 82 of the Acts of 1897.

In speaking of the liability of the wife's separate estate under the statute, we are to be understood as referring only to property over which she has full control. We are not here called upon to express an opinion as to the effect of the statute where there is a limitation upon the *jus disponendi*.

The decisions in this State have gone to great lengths to protect the separate estates of married women engaged in business. We think this act was passed to meet the holdings of the court in *Theus v. Dugger*, 93 Tenn., 41, 23 S. W., 135; *Fedderlicht v. Glass*, 13 Lea, 481, and other cases. These decisions, while perhaps the logical

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result of the rule established in Tennessee at an early date, nevertheless appeared to work hardship and injustice in many instances. It is not surprising that the legislature should have attempted to make a change in the law by this act. It would be indefensible for this court to cripple the act by placing upon it the narrow construction urged in behalf of defendant.

Our construction of this statute is in entire harmony with the construction formerly given by this court to a somewhat similar statute respecting married women who have been abandoned or deserted by their husbands.

In *Yeatman, Shields & Co. v. Bellmain*, 6 Lea, 488, a bill was filed to reach a separate estate of the defendant who had been deserted by her husband and was conducting a millinery business in Nashville. Shannon's Code, section 4505, provides:

"Where a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended. She may also sue and be sued in her own name, for any cause or action accruing subsequent to such desertion."

Construing this statute, the court was of opinion that there was no doubt as to the liability of the separate estate of defendant for debts incurred by her in the conduct of her business.

This case we think to be directly in point here and a sound authority to reinforce our construction of the act of 1897.

Other matters arising in this case have been disposed of orally. The decree of the chancellor will be reversed, and the case remanded for answer.

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TENNESSEE CENTRAL RAILROAD COMPANY v. T. W.
BROWN, *Admr., etc.*

(*Nashville*. December Term, 1911.)

1. **DEATH.** Declaration for wrongful death must aver the existence of a beneficiary or beneficiaries of one of the classes for whose use action is preserved by statute.

In an action for the death of one caused by the negligence or wrongful act of another, brought under the statute providing that such actions may be brought for the benefit of the surviving husband, wife, child, or next of kin of the decedent, the declaration must aver not only the negligence and wrong causing the death, but also the existence of a beneficiary or beneficiaries of one of the classes for whose use the action is preserved by the statute. (*Post*, pp. 355, 356.)

Cases cited and approved: Railroad v. Lilly, 90 Tenn., 563; Railroad v. Pitt, 91 Tenn., 90; Love v. Railroad, 108 Tenn., 104; Railroad v. Maxwell, 113 Tenn., 473.

2. **ARREST OF JUDGMENT.** Motion must distinctly state and specify the supposed defect in the declaration.

It is a long standing and well-established rule, in both civil and criminal cases, that a motion in arrest of judgment must distinctly state and specify the supposed defect in the declaration, and wherein its averments show, by the specified facts stated or by its failure to state certain specified facts, that the plaintiff is, under the law, not entitled to maintain his suit, so as to challenge the attention of the plaintiff and that of the court directly to the specific objection relied on. (*Post*, pp. 356-359.)

Cases cited and approved: State v. Steele, 3 Heisk., 135; Hobbs v. Railroad, 9 Heisk., 878; Hall v. State, 110 Tenn., 369; State v. Wing, 32 Me., 581; Noyes v. Parker, 64 Vt., 379; People v. Dick, 37 Cal., 277; State v. Bryan, 89 N. C., 531; Vandever v. Garshwiler, 63 Ind., 186.

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3. **SAME. Same.** Motion upon the stated ground that no cause of action was stated in the declaration is insufficient; case in judgment.

In an action by an administrator for the recovery of damages for the death of his intestate, caused by the wrongful act and negligence of the defendant, a motion in arrest of judgment, made upon the stated ground that no cause of action was alleged in the declaration, was *held* to be insufficient, in that it did not specifically point out the failure of the declaration to aver the existence of any statutory beneficiary entitled to the recovery, and for whose use the action was prosecuted. (*Post*, pp. 354, 355, 357-359.)

4. **PLEADING AND PRACTICE.** Declaration may be amended after motion in arrest of judgment, where the ends of justice require it.

Under the statute (section 4583 of Shannon's Code), providing that no writ, pleading, process, return, or other proceeding in any civil action in any court shall be abated or quashed for any defect, omission, or imperfection, and under another statute (section 4587 of Shannon's Code), providing that the court may allow material amendments at any stage of the proceeding, upon such terms and subject to such rules as it may prescribe, the trial court may permit a declaration to be amended to meet the ends of justice, even after a motion in arrest of judgment has been made, and the refusal of such amendment may constitute reversible error. (*Post*, pp. 359, 360.)

Code cited and construed: Secs. 4583, 4587 (S.); secs. 3574, 3578 (M. & V.); secs. 2863, 2867 (T. & S. and 1858).

Case cited and approved: *Love v. Railroad*, 108 Tenn., 104.

5. **SAME. Same.** Amendment of declaration to cure defect supplied by proof may be allowed after motion in arrest of judgment, when; case in judgment.

Where the omission of material facts in the declaration constituted such defect as to furnish ground for arrest of judgment upon proper motion, and such facts were proved on the

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trial, without objection, the trial court may allow the declaration to be amended so as to prevent a miscarriage of justice, even after a motion in arrest of judgment is made pointing out such defect so supplied by the proof without objection; as, where the declaration in the administrator's suit to recover damages for the wrongful death of his intestate failed to aver the existence of any statutory beneficiary, but the proof showed the existence of such beneficiary, the trial court should allow an amendment curing such defect, upon a motion in arrest of judgment pointing out the same. (*Post*, pp. 359, 360.)

Case cited and approved: *Love v. Railroad*, 108 Tenn., 104.

6. **SAME.** Amendment of declaration after entry of judgment, where justice requires it.

A declaration may be amended where justice requires it, even after entry of judgment; for the trial court may set aside the judgment for that purpose, in a proper case, at any time before final adjournment. (*Post*, p. 360.)

7. **SAME.** Upon allowing amendment, new trial may be granted, when.

If the matter of the amendment is controverted in a proper manner, the trial court may set aside the verdict, grant a new trial, and upon such other terms as seem meet and just under the facts. (*Post*, p. 360.)

8. **SAME.** Amendments in supreme court to prevent failure of justice.

In some cases, although rare, amendments will be allowed in the supreme court, to prevent a failure of justice. (*Post*, p. 360.)

Case cited and approved: *Martin v. Bank*, 2 Cold., 335.

9. **DEATH.** One beneficiary as administrator recovering damages for wrongful death recovers as trustee for all beneficiaries.

The father of a decedent, as administrator of his estate, is entitled to recover damages for the death of his intestate, caused by defendant's negligence, although there may be beneficiaries other than himself; for his recovery is as trustee for the real beneficiaries under the statute. (*Post*, p. 360.)

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FROM SMITH.

Appeal from the Circuit Court of Smith County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—C. E. SNODGRASS, Circuit Judge.

H. M. HALE, W. V. LEE and WALTER STOKES, for Railroad.

FISHER & FISHER, B. A. BUTLER and JOHN J. GORE, for Brown.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

The plaintiff, T. W. Brown, as administrator of A. O. Brown, deceased, brought this suit in the circuit court of Smith county to recover damages for the death of his intestate, caused by the wrongful and negligent conduct of the defendant railroad company. The declaration contains two counts, both of which state a good cause of action against the defendant, with the exception that there is no averment in either of them that the intestate left him surviving a widow, child, or next of kin for whose benefit the action is prosecuted. The defendant pleaded the general issue of not guilty.

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There was a trial, resulting in a verdict in favor of the plaintiff. A motion for a new trial was made and overruled. A motion in arrest of judgment was afterwards made in these words: "The defendant, by its attorney, then moved the court to arrest the judgment, upon the ground that no cause action is alleged in the declaration."

This was also overruled, and judgment then entered upon the verdict in favor of the plaintiff as administrator of the decedent.

The defendant prosecuted an appeal in the nature of a writ of error to the court of civil appeals, and assigned several errors, all of which were determined against it, except one predicated upon the action of the trial judge overruling its motion in arrest of judgment, which was sustained, the judgment reversed, and the suit dismissed. The case is now before this court upon a petition for *certiorari* to review this action of the court of civil appeals.

The statutes of this State, upon which this suit is predicated, abrogate the rule of the common law that all rights of action for the death of one caused by the negligence or wrongful act of another abate and are extinguished by the death of the injured person, only in cases where the husband or wife, child, or next of kin survive the decedent, for whose use the cause of action which the decedent would have had, had not death ensued, is continued and preserved, and may be prosecuted to judgment. Where there are no such surviving relatives, the

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common law remains unchanged, and no action in such cases can be maintained.

Therefore, in order to present a good cause of action to recover damages for the death of another, the plaintiff must aver in his declaration, not only the negligence and wrong causing the death of the decedent, but the existence of a beneficiary, or beneficiaries, of one of the classes for whose use the action is preserved. *Railroad Co. v. Lilly*, 90 Tenn., 563, 18 S. W., 243. The averment of beneficiaries is as much one of substance as that of the negligent and wrongful act resulting in death. This court has repeatedly held that the declaration in cases of this character must contain averments of the existence of a beneficiary, or beneficiaries, of one of the classes provided for by the statutes, the name or names of such beneficiary, or beneficiaries, and that the action is brought for their use, and that in the absence of such averments, a demurrer to the declaration, or a motion in arrest of judgment, will be sustained, unless the omission be cured by proper and seasonable amendment. *Railroad Co. v. Maxwell*, 113 Tenn., 473, 82 S. W., 1137; *Railroad Co. v. Pitt*, 91 Tenn., 90, 18 S. W., 118; *Love v. Railway Co.*, 108 Tenn., 104, 35 S. W., 475, 55 L. R. A., 471.

The sole question, then, that we have for determination, is whether the motion in arrest of judgment, made for the defendant in the trial court, sufficiently pointed out the omission of an averment in the declaration of the existence of a beneficiary, or beneficiaries, entitled to recover, and for whose use the suit was prosecuted.

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We are of the opinion that it was not sufficient to require the action of the court favorable to the defendant. A motion in arrest of judgment must distinctly state and specify the supposed defect in the declaration, and wherein its averments show or fail to show that the plaintiff is, under the law, not entitled to maintain his suit, so as to challenge the attention of the plaintiff and that of the court directly to the objection relied on. This rule is of long standing and well established in this State. It is applied and enforced in both civil and criminal cases. In the case of *State v. Steele*, 3 Heisk., 135, it is said:

“The record does not disclose for what reason the judgment in this case was arrested. The motion in arrest is general, and specifies nothing. It is certainly the better, if not the only correct, practice, in civil as well as criminal cases, formally to assign reasons in arrest of judgment upon the record, in support of the motion in arrest, so that the attention of the court, in the first instance, may be at once directed to the alleged defect in the proceedings, and that the public, through all time, may, upon examination of the record, be informed as to the grounds of its action. See 2 Tidd’s Pr. (3 Am. Ed.), 918, note; 3 Black. Com., 393, note; Appendix, Id., xl; *State v. Wing*, 32 Me., 581; 1 Waterman’s Archb. Cr. Pr., 671, 672.”

In *Hall v. State*, 110 Tenn., 369, 75 S. W., 717, Mr. Chief Justice Beard, speaking for the court, said:

“In addition, the motion in arrest should state con-

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cisely the defects complained of, or the ruling of the lower court upon such motion, it is held, cannot be reviewed on appeal. *Noyes v. Parker*, 64 Vt., 379, 24 Atl., 12; *People v. Dick*, 37 Cal., 277; *State v. Wing*, 32 Me., 581; *Vandever v. Garshwiler*, 63 Ind., 186; *State v. Bryan*, 89 N. C., 531. . . . This court has held that this was 'the better, if not the only correct, practice.' *State v. Steele*, 3 Heisk., 135.

"A motion in arrest is much in the nature of a demurrer, which goes to defects upon the face of the pleadings, and this common law ruling, requiring the motion in arrest to point out to the trial court matters complained of, is in accordance with the spirit of our legislation as to demurrers. The general demurrer prevailed for many years in this State, but it was finally condemned as a vicious practice, in that it laid a trap for trial courts and for adversary counsel. So the Code of 1858 abolished it, and provided that the demurrer must specify the defects relied on." *Hobbs v. Railroad Co.*, 9 Heisk., 878.

The motion in this case does not comply with that rule. It does not point out the defect in the declaration relied on to arrest judgment. The mere statement, "that no cause of action is alleged in the declaration," invites the court to a consideration of the entire pleadings, and may relate to any averment which would defeat the action, or the failure to aver innumerable facts that might be required to make out a cause of action. The court is not required to accept this invitation. It is the duty of counsel, if he conceives that a defect exists which does

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injustice to his client, to distinctly point it out in the motion. All rules of practice are intended to promote the administration of justice, and are enforced for that purpose, and not to defeat it. It would be unfair and unjust to plaintiffs to allow the objection relied on to be made in such form as not to notify them of it, and, when overruled by the court, to be assigned as error in an appellate court, where it cannot be remedied. This case forcefully illustrates the injustice that would follow such a practice. If the defect here complained of had been pointed out and called to the attention of the plaintiff, and that of the court, by specific objection, the declaration could and doubtless would have been amended, and a miscarriage of justice avoided, because it had been proven on the trial, without objection, that the decedent was the son of the plaintiff and unmarried, and, in the absence of a widow or children, plaintiff would be entitled to the recovery.

Amendments are liberally allowed to meet the ends of justice. It is provided by Code, section 2863 (Shannon's Ed., section 4583), that no writ, pleading, process, return, or other proceeding in any civil action in any court shall be abated or quashed for any defect, omission, or imperfection, and by section 2867 (Shannon's Ed., section 4587) that the court may allow material amendments at any stage of the proceeding, upon such terms and subject to such rules as it may prescribe.

It has been held error for the trial court to refuse to allow an amendment of the declaration so as to aver the

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existence of a beneficiary in an action of this kind. *Love v. Railway Co.*, supra.

The judgment had not been entered when the motion in arrest was made, and it was not too late for amendments. And, had it been entered, the court could have set it aside at any time before final adjournment; a proper case for such action being made to appear, for that purpose, justice requiring it. In some cases, although rare, amendments will be allowed in this court to prevent a failure of justice. *Martin v. Bank*, 2 Cold., 335.

No injustice would have been done the defendant by allowing the plaintiff to amend his declaration when the motion in arrest was made; for if the defendant desired to controvert the relation of the plaintiff to the decedent, or to show there was some one who had a prior right to the recovery, and this had been made to appear in a proper manner, the court would have set aside the verdict, granted a new trial, and imposed such other terms as seemed meet and just under the facts.

Nor is there anything in the objection that there may be other beneficiaries than the father entitled to the recovery. The defendant had an opportunity to prove this, but did not do so. The administrator also recovers as trustee for the real beneficiaries under the statute, and can be held to account to them, whoever they may be, for the proceeds of the judgment.

The judgment of the court of civil appeals is therefore reversed, and that of the trial court affirmed, with costs.

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MAYOR AND CITY COUNCIL OF NASHVILLE v. F. E.
PATTON *et ucc.*

(*Nashville.* December Term, 1911.)

1. **CERTIORARI.** Petition for certiorari to review judgment of court of civil appeals must be complete within itself, and not by reference to the record or other papers.

Under the statute (Acts 1907, ch. 82, sec. 8) providing that the supreme court may issue a writ of *certiorari* to review a judgment of the court of civil appeals upon a sworn petition stating the substance of the case to be decided, accompanied by assignments of error, and brief in support thereof, the petition must, within its four corners, present a case which will enable the supreme court to determine whether the writ should be granted, and it must not attempt to supply the statement of facts and assignments of error by reference to any other paper, or to the record of the court of civil appeals. (*Post*, pp. 366-369.)

Acts cited and construed: Acts 1907, ch. 82, sec. 8.

2. **SAME.** Same. Petition for certiorari must, upon its face, point out specific errors in the judgment of the court of civil appeals.

Under the statutory provisions, stated in the first headnote, as to the requisites of the petition for the *certiorari*, and under the additional provisions that, upon the granting of the writ, the original transcript filed in the court of civil appeals shall be filed in the supreme court, which, together with the petition, assignments of error, the briefs, writs of error and *supersedeas*, when issued, shall constitute the record in the supreme court, the court of civil appeals is not made a mere intermediate court whose work is to be treated as merely incidental, so that the petition for the writ of *certiorari* need only reassign the errors and present the briefs made therein, but it is necessary to show some specific error in the action of that court. (*Post*, pp. 366-370.)

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Acts cited and construed: Acts 1907, ch. 82, sec. 8.

3. **SAME.** Consideration to be given to opinion of court of civil appeals in filing petition for *certiorari* to review its judgment.

In making application for a writ of *certiorari* to review a judgment of the court of civil appeals, counsel should make an attentive examination of the opinion of that court, and give a sedate consideration as to the probability of obtaining a reversal; and the proper standpoint from which to view the matter is an attentive consideration of the work accomplished by that court in the particular case, and a careful formulation of the objection to that work. (*Post*, pp. 369-370.)

4. **SAME.** Mode of action of supreme court upon petition for *certiorari* to review a judgment of the court of civil appeals.

If the petition for a writ of *certiorari* to review a judgment of the court of civil appeals fails to state a case for relief, the supreme court will disallow it, without going further into the record; but if it states a case for relief, the supreme court will examine the opinion of the court of civil appeals, and the record and the briefs of opposing counsel, for the purpose of ascertaining whether the grounds stated in the petition are sustained. (*Post*, p. 369.)

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—THOS. E. MATTHEWS, Circuit Judge.

A. G. EWING, JR., City Attorney, and F. M. GARARD, Assistant City Attorney, for Nashville.

RUTHERFORD & RUTHERFORD, for Patton.

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MR. JUSTICE NEIL delivered the opinion of the Court.

This case was determined against the plaintiff in error by the court of civil appeals at its present term. Thereupon a petition for the writ of *certiorari* was filed in this court.

In order that we may state fully our views of the question of practice suggested by this petition, we set it out in full as follows:

“Petition for *Certiorari*.

“To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of Tennessee:

“Your petitioner, the mayor and city council of Nashville, respectfully represents and shows:

“I. Statement of the Case.

“For a full and detailed statement of the case, we herewith file our printed brief prepared for the court of civil appeals at the October term, 1911, which we make a part of our petition; statement of the case appearing on pages 1 and 2.

“II. Pleadings.

“A statement of the pleadings appears in detail in our brief filed in the court of civil appeals, referred to heretofore, on pages thereof 2 and 3, which we make a part of this petition.

“III. Statement of the Evidence.

“We refer your honors to detailed statement of the evidence, as set out in our brief heretofore mentioned, which we make a part of this petition. This appears on pages 3 to 9, inclusive.

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“IV. Assignment of Errors.

“For assignment of errors, we adopt the assignment made in the court of civil appeals, and make the same a part of this petition. These assignments appear on pages 9 to 33.

“V. Brief and Argument.

“For brief and argument, we refer your honors to our said brief, heretofore filed, pages 34 to 95, adopting the same as a part of this petition.

“CONCLUSION.

“Your petitioner believes that the judgment of the court of civil appeals is erroneous, and that this honorable court should require by *certiorari* the removal of said case to it for review and determination in conformity with the acts of the general assembly of the State of Tennessee in such cases made and provided.

“The court of civil appeals erred in overruling the several and various assignments made by plaintiff in error.

“There is no evidence to support the verdict. The plaintiff, Mrs. Jessie V. Patton, with full knowledge, assumed the risk, and the court erred in declining to charge as requested, and in the conduct of the trial, as assigned in the brief, which is made a part of this petition, and the verdict is excessive, showing total disregard of the evidence and its capriciousness.

“Wherefore, your petitioner prays that the writ of *certiorari* and *supersedeas* may be issued out of and under the seal of this honorable court, directed to the court of civil appeals of Tennessee, commanding said court

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to certify and send to this court, on a certain day to be therein designated, the full and complete record in said case as filed in said court of civil appeals, entitled 'Mayor and City Council of Nashville, Plaintiff in Error, v. F. E. Patton and Wife, Defendants in Error, No —, Davidson Law Docket,' together with all the proceedings of said court therein, to the end that this cause may be reviewed and determined by this court, as provided for in the acts of the general assembly of the State of Tennessee, being chapter 82 of the Acts of 1907, and that your petitioner have such other and further relief in the premises as this honorable court may deem proper and in conformity with said act, and especially that said judgment of said court of civil appeals on said case may be reversed by this honorable court, and that the judgment of the circuit court of Davidson county, Tenn., herein be reversed, and the case dismissed, and that, pending the action of the court on this petition, judgment and execution of the court of civil appeals be superseded.

"Mayor and City Council of Nashville,

"By A. G. EWING, JR., and F. M. GARARD, Attys.
for Petitioner.

"State of Tennessee, Davidson County:

"A. G. Ewing, Jr., makes oath and says that he is the attorney for the foregoing mayor and city council of Nashville, Tennessee, in the case named in the foregoing petition, and that the allegations in said petition are true to the best of his knowledge and belief.

A. G. EWING, JR

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"Sworn and subscribed to before me this the 7th day of November, 1911.

"J. W. DASHELL,
Notary Public."

In the answer filed to the petition it is insisted:

"The petition in this case should be dismissed, for the reason that it does not comply with chapter 82, section 8, Acts of 1907, relating to petitions for *certiorari*. That portion of said act here relied upon reads as follows:

" 'Such *certiorari* shall not be issued after a lapse of ninety days from the final decree or judgment from the court of civil appeals; and it shall not be awarded or issued from the supreme court, except upon petition duly sworn to, stating the substance of the case to be decided, accompanied by assignments of error, or errors, and brief in support thereof.'

"The present petition was filed within ninety days, and was duly sworn to, but the substance of the case to be decided is not stated at all. There are no assignments of error set out in the petition, and there is no brief in support thereof.

"It is true that said petition refers to the original assignments of error in the court of civil appeals for a full and detailed statement of the case; and the original brief filed in the court of civil appeals is also referred to in said petition; but there are no assignments of error in said petition, except those errors assigned in the court of civil appeals, and they are simply referred to under paragraph 4 on the second page of said petition, the same being set out on pages 9 to 33 of petitioner's orig-

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inal brief filed in the court of civil appeals, a copy of which accompanies the record in this cause.

“Section 8 of chapter 82, Acts of 1907, after setting out what the petition for *certiorari* must contain, as above shown, proceeds further as follows:

“‘In such case and when the writ is granted the original transcript filed in the court of civil appeals shall be filed in the supreme court, and together with said petition the assignments of error, the briefs, and writs of error and *supersedeas*, when issued, shall constitute the record in the supreme court,’ etc.

“Now, we do not understand from said act that a mere skeleton petition, containing no statement of the case to be decided, no specific assignment of errors, no specific errors alleged to have been committed by the court of civil appeals, whose action this court is called upon to review, no brief or argument whatever, except such as were originally filed before the case was heard by the court of civil appeals—we do not understand that this sort of thing meets the requirement of that portion of said section 8 first quoted above. That is to say, a simple recital of what the record contains is no compliance whatever with the specific requirements of the act in question. The last quotation from said act, set out *supra*, designates what the record is required to contain, and what proceedings shall be made a part of the record; but we do not understand that a petitioner can simply rely upon having the clerk to get all of these different parts of the record together and in shape, and then present them to this court in a skeleton petition, which does

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nothing more than to simply cite the pages of the record where these various proceedings may be found.

“In other words, may it please your honors, we insist that, before the writs of *certiorari* and *supersedeas* should be issued, a party applying for them must point out some specific error, or errors, committed by the court of civil appeals, and must support his insistence by a brief and argument, specifically pointing to the particular error, or errors, complained of. This is what the statute requires shall be done, and, certainly, sound reason and justice can require no less. Otherwise, the supreme court may be called upon to retry every case that is disposed of by the court of civil appeals with the vague hope that the former court may arrive at a conclusion different from that reached by the latter without reference to any particular error which the latter court may have committed.

“This practice, if tolerated, simply permits a litigant to have two chances to win upon the same presentation. That is to say, he files his assignments of error, and his brief in support thereof, in the court of civil appeals, and presses every argument that he can think of at the trial in that court, and, if unsuccessful, he simply presents the same case, the same record, the same brief, the same bill of exceptions, and the same argument to the supreme court, without reference to any specific error that may have been committed by the court of civil appeals. . . . Rutherford & Rutherford.”

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The foregoing excerpt from the answer to the petition presents truly and correctly the objections to the practice followed by the plaintiff in error.

The petition must within its four corners present to the supreme court a case which will enable us to determine whether the writs applied for should be granted. It must not be demurrable. It must state a case for relief. It must not eke out the statement of facts by reference to any other paper. It must not attempt to supply an assignment of errors complained of by reference to any other paper. It must be complete in itself. Upon reading the petition, if we find that it fails to state a case for relief, it is our duty to disallow it, without going further into the record. If it does state a case, then we examine the opinion of the court of civil appeals, and the record and the briefs of opposing counsel, for the purpose of ascertaining whether the grounds stated in the petition are sustained.

The purpose of the legislature in creating the court of civil appeals was to furnish real assistance to the people of the State in having their appellate business speedily disposed of. That court is composed of able and accomplished judges, and their work is always well done. While many cases are brought from that court to the supreme court on petitions for the writ of *certiorari*, not more than eight or ten out of one hundred of such petitions are successful. This fact alone shows how sound is the work of the court of civil appeals.

Before filing a petition for *certiorari* for the purpose of transferring a case from the court of civil appeals to

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the supreme court, there should be on the part of counsel an attentive examination of the opinion of the court of civil appeals, and a sedate consideration of the probability of obtaining a reversal. If such practice be permissible as that adopted by the petitioner in the present case, then the work of the court of civil appeals is treated as merely incidental, and the petition in the supreme court as experimental. It is easy to file a skeleton petition, and refer for a statement of facts and of the errors complained of, and for the arguments to sustain these errors, to the statement of facts, assignments of error, and briefs filed in the court of civil appeals. This requires no special consideration of the matters to be presented by the application to the supreme court for relief. It is simply saying, in general terms: "We make the same objections to the judgment of the court of civil appeals that we made in that court to the judgment of the trial court." Whereas, the proper standpoint from which to view the matter is an attentive consideration of the work accomplished by the court of civil appeals in the particular case, and a careful formulation of the objections to that work. If this course should be pursued, there would be a far less number of inconsiderate petitions filed.

It results that the petition in the present case must be disallowed.

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J. W. BRINKLEY v. STATE.**(Nashville. December Term, 1911.)*

- 1. CONSTITUTIONAL LAW.** Power and duty of courts to declare legislative acts void for imposing excessive bail, excessive fines, and cruel and unusual punishments.

While our supreme court has never declared an act of the legislature to be void under our constitutional provision (art. 1, sec. 16) forbidding excessive bail, excessive fines, and cruel and unusual punishments, still it is the clear weight of modern authority that the courts have such power, and, in a proper case, it is their duty, to declare legislative acts void under said constitutional provision. (*Post*, pp. 382, 383.)

Constitution cited and construed: Art. 1, sec. 16.

Cases cited and approved: *State v. Lasater*, 9 Bax., 587; *Parks v. Railroad*, 13 Lea, 8; *Loeb v. Jennings*, 133 Ga., 796.

- 2. SAME.** Statute making federal license *prima facie* evidence of sales of intoxicating liquors is not unconstitutional as imposing excessive fines, and cruel and unusual punishments.

The statute (Acts 1903, ch. 355) providing that the defendant's payment of the internal revenue special tax as a retail liquor dealer, or his possession of an internal revenue tax stamp as a retail liquor dealer, shall, during the time covered by such payment or stamp, be *prima facie* evidence of sales of intoxicating liquors within the meaning of the law prohibiting the sale of intoxicating liquors within four miles of a schoolhouse, is not unconstitutional as contrary to the constitutional provision (art. 1, sec. 16) forbidding excessive fines, and cruel and unusual

*Power of legislature to enact *prima facie* rules of evidence for criminal cases, see note in 2 L. R. A. (N. S.), 1007.

As to statute making possession of liquor *prima facie* evidence of intent to violate law against illegal sale, see note in 1 L. R. A. (N. S.), 626.

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punishments, because the punishment for a single offense under the statute is not excessive, or cruel and unusual, and is not claimed to be so, and while a person may be indicted, fined, and punished for each day that he is in the possession of the revenue tax stamp, this results from his own voluntary act in being in possession of the tax stamp contrary to the laws of the State; for a person, in taking out such federal license, is not seeking to redress any wrong done him in his person or property, nor is it in furtherance of his right to pursue an occupation guaranteed to him under the law, and the license can be surrendered at any time and the penalties of the law avoided. (*Post*, pp. 378-384.)

Acts cited and construed: Acts 1903, ch. 355.

Constitution cited and construed: Art. 1, sec. 16.

3. **SAME.** Same. Statute making federal license prima facie evidence of sales of intoxicating liquors is not unconstitutional as vicious class legislation in excepting druggists and manufacturers of liquor.

The statute (Acts 1903, ch. 355), whose provisions are substantially stated in the preceding headnote, is not unconstitutional as vicious class legislation, because of its proviso excepting from its provisions those having such revenue license for the use of manufacturers, druggists or others in manufacturing or compounding, or otherwise than for use in sale at retail under State laws, since it is not unlawful for druggists to sell intoxicating liquors for other than beverage purposes, or to compound medicines with intoxicating liquors, and, at the date of the passage of said statute, it was not unlawful to manufacture intoxicating liquors. Instead of vitiating the act, the exception saves it. (*Post*, pp. 378, 384.)

Acts cited and construed: Acts 1903, ch. 355.

Constitution construed but not cited: Art. 11, sec. 8.

Cases cited and approved: *Kelly v. State*, 123 Tenn., 544; *Lindsey v. Gas Co.*, 220 U. S., 78.

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4. **SAME.** Legislative power to prescribe rules of evidence; statute making possession of federal license *prima facie* evidence of unlawful sale of intoxicating liquors is not unconstitutional for that reason.

The statute (Acts 1903, ch. 355), whose provisions are substantially stated in the second headnote, is not unconstitutional in making the payment for and possession of a federal internal revenue license *prima facie* evidence of the violation of the statute prohibiting the sale of intoxicating liquors within four miles of a schoolhouse, during the time covered by such license; for legislation prescribing such rules of evidence is within the power of the legislature, since there is a direct and open connection between the voluntary possession of such license and the fact of such violation, and the statute gives the party charged a fair opportunity to make his defense, and to submit all of his evidence to the court and jury to be weighed by them upon all the evidence within his control and properly submitted. (*Post*, pp. 384-386.)

Acts cited and construed: Acts 1903, ch. 355.

Cases cited and approved: *Horne v. Railroad*, 1 Cold., 72; *Diamond v. State*, 123 Tenn., 348; *Adams v. New York*, 192 U. S., 585; *Railroad v. Turnipseed*, 219 U. S., 42; *Meadowcroft v. People*, 163 Ill., 56; *Commissioners v. Merchant*, 103 N. Y., 143; *People v. Cannon*, 139 N. Y., 32; *State v. Thomas*, 144 Ala., 77.

5. **INTOXICATING LIQUORS.** Internal revenue license is competent evidence for the period covered by its duration as determined from the amount paid and the date it became effective.

In a prosecution for the unlawful sale of intoxicating liquors as a beverage within four miles of a schoolhouse where school is kept, charged to have been made on the 20th day of October, 1910, a certificate of the collector of internal revenue for the federal government that the accused had paid the internal reve-

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nue special tax as a retail liquor dealer, that his license was in effect from September 10, 1910, and that he paid a certain sum which under the law would indisputably extend the time for which he paid beyond October 20, 1910, the date laid in the indictment, was competent and admissible in evidence, although the certificate did not expressly show the duration of the period covered by the license. (*Post*, pp. 386, 387.)

Acts cited and construed: Acts 1909, ch. 384.

6. **SAME.** Internal revenue license for retail sale of malt liquor is *prima facie* evidence of unlawful sales of malt intoxicating liquors only; accurate charge of court so stating; liquors—spirituous, vinous, and malt.

In a prosecution for the unlawful sale of intoxicating liquors as a beverage within four miles of a schoolhouse where school is kept, the trial judge's charge, stating that the payment by defendant of the internal revenue special tax for license as a retail liquor dealer was *prima facie* evidence of sales of intoxicating liquors in violation of the said four mile law, during the time covered by such license, defining the terms "liquor," "spirituous liquor," "vinous liquor," and "malt liquor," stating that an internal revenue license for the sale of malt liquors was *prima facie* evidence only of the unlawful sales of malt intoxicating liquors, during the time he possessed such federal license, but not *prima facie* evidence of the unlawful sales of spirituous or vinous intoxicating liquors; but that the presumption arising from the possession of such license might be rebutted, and instructing the jury to find the accused guilty, if they believed from the evidence beyond a reasonable doubt that he had retailed or sold malt intoxicating liquors as charged in the indictment, and to find him not guilty if there was a reasonable doubt in their minds as to the guilt of the accused, was *held* to be a plain, clear, and accurate statement of the meaning of the statute (Acts 1903, ch. 355), making the payment of an internal revenue tax *prima facie* evidence of the unlawful sale of intoxicating liquors in violation of the four mile law, as applied to the facts in the case. (*Post*, pp. 380, 381, 387.)

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7. **SAME.** Burden is cast upon accused by payment of internal revenue tax and by conviction to show his innocence is not removed by showing absence of sales of intoxicants, when.

In a prosecution for the unlawful sale of intoxicating liquors as a beverage within four miles of a schoolhouse where school is kept, the testimony of five or six witnesses that they had patronized the accused, and had never purchased intoxicants from him; the fact that no intoxicating liquors were in his possession when his place of business was closed under a distress warrant; and the fact that he was in possession of nonintoxicating beverages, do not, on appeal by the accused from a verdict and judgment of conviction, rebut the presumption of guilt arising from his payment of the federal internal revenue tax as a retail liquor dealer, in the absence of the testimony of the accused himself or of any one who was in charge of the business for him, since the verdict and judgment of conviction and the statute (Acts 1903, ch. 355), making the payment of such tax *prima facie* evidence of a violation of the four mile law, both cast upon the accused the burden of showing his innocence. (*Post*, p. 388.)

Acts cited and construed: Acts 1903, ch. 355.

8. **CRIMINAL LAW.** Burden is upon the accused to show his innocence in the supreme court.

The inquiry in the supreme court is not whether the accused is guilty, but whether he is innocent; for the burden of showing his innocence is cast upon him by the verdict of guilty, approved by the trial judge. (*Post*, p. 388.)

9. **SAME.** Former acquittal cannot be pleaded in bar of subsequent prosecution for a similar offense on a subsequent date where conviction is sought upon ground of possession of federal license to sell liquors, when.

In a prosecution for the unlawful sale of intoxicating liquors as a beverage within four miles of a schoolhouse where school is kept, made by a person who had paid the federal internal revenue tax as a retail liquor dealer, a former acquittal of a similar offense charged to have been committed on a different day,

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given because the State offered no evidence to show that the place of business of the accused was within four miles of a schoolhouse, and pleaded as a defense in bar of the prosecution, was properly overruled by the trial judge, since, under the statute (Acts 1903, ch. 355), making the payment of such special tax *prima facie* evidence of the violation of the said four mile law, the accused is presumed to be guilty, and may be convicted, of a separate offense for each day of the time covered by the payment of such special tax. (*Post*, pp. 388, 389.)

FROM WARREN.

Appeal from the Circuit Court of Warren County.—
EWIN L. DAVIS, Judge.

JNO. L. WILLIS, for Brinkley.

ATTORNEY-GENERAL CATES, for State.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

The plaintiff in error was indicted in the circuit court of Warren county at its May term, 1911, for the unlawful sale of intoxicating liquors as a beverage within four miles of a schoolhouse where school is kept. The defendant filed a plea of former acquittal, and, upon the determination of the issues raised by this plea against him by the trial judge without the intervention of a jury, he entered his plea of not guilty. A trial was had by the

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court and jury, which resulted in a verdict of guilty, and a judgment of fine and imprisonment, from which he has appealed and assigned errors. On the trial before the jury, the State offered in evidence a copy of the record in the office of the internal revenue collector of the United States for the district of Tennessee, showing that the plaintiff in error had paid the internal revenue special tax as a retail malt liquor dealer on Main street, McMinnville, Tennessee, from September 1, 1910, to June 30, 1911. This record, together with proof that the place of business of the plaintiff in error was within four miles of a schoolhouse where school is kept, is all the proof that was offered in behalf of the State. Plaintiff in error did not testify in his own behalf, but introduced the county court clerk, who testified that he issued a distress warrant against the plaintiff in error, which was placed in the hands of the sheriff, and the plaintiff in error's place of business was closed by the sheriff on Saturday, November 5, 1910, and the sheriff locked up the house, and on the following Monday, November 7th, the witness and others invoiced the stock of goods of the plaintiff in error found in his place of business. There was a stock of beerette, coca-cola, soda fount, ice box, glasses, counter or bar, which looked like an old saloon bar, a mirror, two pool tables, and a screen in front of the door. The counter was up towards the front door, and the poolroom in the rear of the house. No intoxicating liquors were found. Two or three empty whisky bottles were found upstairs in plaintiff in error's house, where there was a bed. The beerette looked and

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tasted like beer, according to the evidence of plaintiff in error's witnesses; but there is no proof that it was intoxicating.

Chapter 355, acts of 1903, provides in the first section thereof as follows:

"That in all prosecutions for a violation of the law prohibiting the sale of intoxicating liquors within four miles of a school house, commonly known as the "four mile law," the fact that defendant has paid the internal revenue special tax, as a retail liquor dealer or is in possession of an internal revenue tax stamp as a retail liquor dealer, shall be *prima facie* evidence of sales of intoxicating liquors within the meaning of the four mile law, during the time for which he has paid the internal revenue special tax, or that is covered by the internal revenue special tax stamp possessed by him: Provided, revenue license in this act shall not be construed to mean license for use of manufacturers and druggists or others in manufacturing or compounding or otherwise than for use in sale at retail under State law."

Chapter 384 of the Acts of 1909 provides in the first section thereof as follows:

"That in all prosecutions for violation of the laws of this State prohibiting the sale of intoxicating liquors, copies of the records in the office of the internal revenue collector of the United States for the district of Tennessee, showing that the defendant has paid the internal revenue special tax as a liquor dealer, or showing the issuance to the defendant of an internal revenue special tax stamp, shall be admitted as competent evi-

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dence, when such copies are certified to be full, true and complete by the district internal revenue collector."

Copy of the record from the office of the internal revenue collector, introduced by the State and relied upon as making a *prima facie* case of guilt, is as follows:

"Name, Brinkley, J. W. Business, retail malt liquor dealer. Place, McMinnville, Tenn., Main street. From what time, September 1—10. Amount of tax, \$16.67. Date of payment or issue of certificate, Sept. 30—10. Serial number of stamp, 12504."

"I, W. A. Dunlap, collector of internal revenue for the district of Tennessee, hereby certify that the foregoing is a full, true, and complete copy of entries on record 10 in my office, showing the payment by special tax payers in Warren county of special tax of liquor dealers for the period from July, 1910, to June 30, 1911.

"Witness my hand and seal of office, at office in the city of Nashville, Tennessee, this 5th day of August, 1911.

"W. A. DUNLAP,

"Collector of Internal Revenue, Dist. of Tenn.,

"By E. S. Priest, Chief Clerk."

The learned trial judge gave the following instructions to the jury:

"The State has introduced and read to you a certified transcript of the record of the issuance of federal liquor license or tax stamp in Warren county, Tenn., and I instruct you that this transcript is competent evidence, and that it shows that the defendant on September 30, 1910, paid \$16.67 for, and received, a certificate from

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the United States government authorizing him to engage in the business of a retail malt liquor dealer on Main street, in McMinnville, Tenn., from September 1, 1910, to June 30, 1911.

“I further instruct you, in the language of the statute, chapter 355 of the Acts of 1903, that in all prosecutions for a violation of the law prohibiting the sale of intoxicating liquors within four miles of a schoolhouse, commonly known as the four mile law, the fact that defendant has paid the internal revenue special tax as a retail liquor dealer, or is in possession of an internal revenue tax stamp as a retail liquor dealer, shall be *prima facie* evidence of sales of intoxicating liquor within the meaning of the four mile law, during the time for which he has paid the internal revenue special tax, or that is covered by the internal revenue special tax stamp possessed by him.

“I further instruct you that the term ‘liquor,’ used in said statute, is a general term, comprehending and including the different kinds of intoxicating liquors, which are classed and designated as spirituous, vinous, and malt intoxicating liquors, as charged in the indictment in this cause. What is meant by ‘spirituous liquors’ is distilled liquor, such as whisky and brandy; what is meant by ‘vinous liquors’ is liquor made from the grape, etc., such as wine; and what is meant by ‘malt liquors’ is liquor made from malt, such as beer, malt, etc.

“Consequently you are instructed that the federal internal revenue special tax stamp shown to have been is-

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sued to defendant merely authorized him to sell malt liquor; and, while the possession of such a license is *prima facie* evidence of sales of malt intoxicating liquors during the time he possessed such federal license, yet it is not *prima facie* evidence of sales of spirituous or vinous liquors, or that he exercised the privilege of a dealer in spirituous or vinous intoxicating liquors.

“However, you are instructed that such presumption arising from the possession of federal license or internal revenue special tax stamp may be rebutted by such proof as satisfies you that the defendant did not make any sales of malt intoxicating liquor on the date charged in the indictment, or by such proof as raises in your minds a reasonable doubt as to whether he made such sales on the date stated.

“Applying the law to the facts in this case, you are instructed that if you find from the proof, and believe beyond a reasonable doubt, that the defendant retailed or sold malt intoxicating liquors on the date charged in the indictment, and in Warren county, Tenn., and within four miles of a schoolhouse where a school was kept, then he would be guilty as charged, and you should so find.

“On the other hand, if there is a reasonable doubt in your minds as to defendant’s guilt as charged, you should acquit him.”

The assignments in the court, which will be considered in this opinion, are that chapter 355, Acts of 1903, is unconstitutional, because it violated section 16 of article 1 of the constitution of this State, forbidding

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excessive bail, excessive fines, and cruel or unusual punishments. For this reason, it is said that a person may be convicted and imprisoned for life by such evidence for a series of small misdemeanors, providing for a jail sentence of six months, if he should have such license issued to him for six months or more, because an indictment would lie, and a conviction could be had, upon the evidence of the license for each day during the period the license had to run, and also because the legislature has no power by legislative act to declare the possession of such a license to be *prima facie* evidence of guilt, as this would, in effect, be declaring a thing to be that which in truth and in fact it is not.

It is also said this legislation is unconstitutional as class legislation, because it excepts from its provisions druggists and others who handle it and manufacturers who make intoxicating liquors.

1. This court has never declared void an act of the legislature under the sixteenth section of the Bill of Rights, forbidding excessive bail, excessive fines, and cruel and unusual punishments, in any reported case known to us. In *State v. Lasater*, 9 Baxt., 587, the power of the court to do so in any case was doubted, but not determined. In *Parks v. Railroad Co.*, 13 Lea, 8, 49 Am. Rep., 655, the power of the court to declare such a statute void was assumed in the opinion of Cooper, J., but not decided. However, we think that the profession generally understands, and the clear weight of modern authority is, that the courts have such power under section 16 of the Bill of Rights, and in a proper case presenting the question,

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it would be their undoubted duty to do so. *Loeb v. Jennings*, 133 Ga., 796, 67 S. E., 101; 18 Am. & Eng. Ann. Cas., 376. Still, under all of the authorities, it cannot be doubted that the act assailed in this case does not fall within the prohibition of this section of the constitution.

Plaintiff in error, in taking out the federal license authorizing him to retail malt liquor, was not seeking to redress any wrong done him in his person or property, nor was it in furtherance of his right to pursue an occupation guaranteed him under the law. The license was taken with full knowledge upon his part that the act of paying the fees, or being possession of the stamp, would raise a presumption sufficient to support a conviction of crime under the laws of this State. While the license would protect him against the federal government in the pursuit of the occupation authorized by it under the laws of that government, it at the same time brought him into direct conflict with the laws of this State, and created a presumption that he was violating the law against the sale of intoxicants. The mere fact that he might be indicted, fined, and punished for each day that he was in possession of the license does not make the fines excessive, or the punishment cruel and unusual. The conditions which produce the fines and punishments are created by his act alone. A fine and imprisonment for a single offense under this statute is not claimed to be excessive, or cruel and unusual. Whether there should be other fines and imprisonments is wholly within the power of plaintiff in error. Therefore, if the con-

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tinued violation of this law should result in excessive fines and cruel and unusual punishments, it is not the act of the government, but is the voluntary act of plaintiff in error. The license could be surrendered at any time and the penalties of the law avoided.

2. This act is not vicious class legislation, because of the exception in favor of druggists and others who handle intoxicating liquors and manufacturers who make them. It is not unlawful for druggists to sell for other than beverage purposes, or to compound medicines with intoxicating liquors, and, at the date of the passage of this act, it was not unlawful for manufacturers to make them. Instead of vitiating the act, the exception saves it. The legislature could not have made the possession of a license from the federal government *prima facie* evidence of guilt, when the thing authorized by the federal government was likewise authorized by the State government. There was no law to violate, and no crime to commit, by druggists and manufacturers, by the mere fact of handling and compounding by the one and manufacturing intoxicating liquors by the other. *Kelly v. State*, 123 Tenn., 544, 132 S. W., 193; *Lindsley v. National Carbonic Gas Co.*, 220 U. S., 78, 31 Sup. Ct., 337, 55 L. Ed., 377, and authorities there cited.

3. It is not beyond the power of the legislature to declare the possession of federal internal revenue license by one engaged in business within four miles of a schoolhouse where school is kept *prima facie* evidence of guilt under an indictment for violating the four-mile law. A similar statute was held valid by this court in *Diamond*

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v. *State*, 123 Tenn., 348, 131 S. W., 666. The general power of the legislature to prescribe rules of evidence and methods of proof can no longer be doubted under modern authority. That this power has its constitutional limitations was stated in *Diamond v. State*, supra. Such a law, having for its effect a denial of the party charged of the right to rebut and overcome the presumption created by it, would be void. So would a law which made an act *prima facie* evidence of crime over which the party charged had no control, and with which he had no connection; or which made an act *prima facie* evidence of crime which had no relation to a criminal act, and no tendency of itself to prove the ultimate fact of guilt. But so long as such a law leaves the party charged fair opportunity to make his defense, and to submit all the facts to the court and jury, to be weighed by them upon all evidence within his control legitimately bearing upon them, and so long as the fact from which guilt is to be inferred has a direct and open connection with the ultimate fact of guilt, it is not violative of any constitutional right of the accused. *Meadowcroft v. People*, 163 Ill., 56, 45 N. E., 991, 35 L. R. A., 176, 54 Am. St. Rep., 447; *Auburn Excise Com'rs v. Merchant*, 103 N. Y., 143, 8 N. E., 484, 57 A. M. Rep., 705; *People v. Cannon*, 139 N. Y., 32, 34 N. E., 759, 36 Am. St. Rep., 668; *Adams v. N. Y.*, 192 U. S., 585, 24 Sup. Ct., 372, 48 L. Ed., 575; *Horne v. Memphis & O. R. Co.*, 1 Cold., 72; *State v. Thomas*, 144 Ala., 77, 40 South., 271, 2 L. R. A. (N. S.), 1011, 113 Am. St. Rep., 17, 6 Am. & Eng. Ann. Cas., 744; *M., J. & K. C. R. Co. v. Tur-*

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nipsced, 219 U. S., 42, 31 Sup. Ct., 137, 55 L. Ed., 80, 32 L. R. A. (N. S.), 226.

In the last case cited, Mr. Justice Lurton, speaking for the court, stated the rule thus:

“The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. . . .

“Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and State, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous.”

There is a direct and open connection between the possession of a federal license authorizing the retail sale of intoxicating liquors and the ultimate fact of such sale. The interests of men are such, and experience teaches, that they do not ordinarily incur the expense and trouble of procuring license to engage in the sale of intoxicants, unless they intend to do so. Apart from the statute making the possession of such license *prima facie* evidence of the fact of a sale, the inference might well be drawn, in the absence of all rebutting proof, that one who pays the fees and possesses himself of such license is engaged in the sale of intoxicants.

4. The sale laid in the presentment is of date October 20, 1910. It was objected at the trial below that the

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certificate of the collector of internal revenue could not be considered as part of the record authorized by chapter 384, Acts of 1909, as evidence that plaintiff in error had paid the internal revenue special tax as a liquor dealer, and that the copy of the record to which the certificate is attached fails to show that the tax had been paid for the time covering the date alleged in the presentment. This exception is immaterial. The record produced, to which there is no exception, shows that the beginning of plaintiff in error's license was September 10, 1910, and the amount paid was \$16.67, which, under the law, would indisputably extend the time beyond October 20th, the date laid in the indictment. In addition, the trial judge charged the jury, without exception, that the transcript of the record showing the issuance of the federal liquor license, or tax stamp, to plaintiff in error "shows that the defendant on September 10, 1910, paid \$16.67 for, and received, a certificate from the United States government, authorizing him to engage in the business of a retail malt liquor dealer," etc., and there is no assignment of error to this part of the charge in this court. But, as stated, we think the trial judge correctly construed the meaning of the record.

5. We have fully set out in this opinion the charge of the learned circuit judge construing chapter 355, Acts of 1903, because it is a plain, clear, accurate statement of the meaning of that statute as applied to the facts of this case. The meaning of the statute is so obvious, and is so clearly stated in the charge of his honor, that nothing can be added to strengthen it.

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6. It is earnestly insisted that the evidence stated in this opinion rebuts the *prima facie* case made against the plaintiff in error by the introduction of the record showing the payment of the stamp tax to the federal government. All of the testimony offered by plaintiff in error amounts to nothing more than a failure to show that a sale was made. The fact that five or six witnesses say that they have patronized him, and never purchased intoxicants from him; the fact that he had no intoxicating liquors in stock at the time his house was closed under the distress warrant; the fact that he was in possession of nonintoxicating beverages—all of these facts do not prove, and can hardly be said to tend to prove, that he had not sold intoxicating liquors within four miles of a schoolhouse. The inquiry in this court is not whether he is guilty, but whether he is innocent. The burden of showing this is cast upon him, not only by the verdict of the jury, approved by the circuit judge, but also by the statute which expressly makes the possession of the retail liquor dealer's license, or the payment of the stamp tax, *prima facie* evidence of guilt. It is not even shown that plaintiff in error is a man of good character, and therefore his character cannot be a witness for him to rebut the case made by the State. He does not testify himself, nor does any one testify who had charge of the business and conducted all of the sales made by and for him.

7. It appears that plaintiff in error was indicted prior to the return of the presentment in this case for the same offense, and that, upon the trial before the circuit judge without the intervention of a jury, the State

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offered as evidence the record hereinbefore set out, without producing any evidence that plaintiff in error's place of business was within four miles of a schoolhouse. The circuit judge acquitted the defendant upon the ground that it was not shown that his place of business was within four miles of a schoolhouse. This judgment was pleaded in this case in bar of this prosecution. The trial judge overruled the plea, and in this he was correct. As insisted by counsel for plaintiff in error under another assignment, he is guilty of an offense for every day of the time covered by the payment of the special stamp tax; and each day that he claims the privilege granted and the immunities guaranteed by the payment of this tax is *prima facie* evidence of a separate offense. The first presentment charged that the defendant was guilty of violating the four-mile law on the ——— day of September, 1910, and the presentment in the case in hand charged that he was guilty of the same offense on the 20th day of October, 1910. This is a continuing offense, and the determination that he was not guilty on one day is not a bar to a prosecution for the same offense alleged to have been committed upon another and different day. This is conceded by counsel, in effect, when it is urged here that the act of 1903 violates section 16 of the Bill of Rights, because plaintiff in error may be convicted of an offense for every day covered by the period of time for which he paid the special stamp tax. A mere statement of the proposition is its own answer.

There is no error in the record, and the case is affirmed.

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C. D. BAILEY, *Clerk*, for the use of the State, v.
GUSTAVUS A. HENRY.

(*Nashville*. December Term, 1911.)

1. INHERITANCE TAXES. Statute to be strictly construed against State and in favor of taxpayer.

The statute (Acts 1893, ch. 174), imposing inheritance taxes, must be strictly construed against the State and in favor of the taxpayer. (*Post*, p. 396.)

Acts cited and construed: Acts 1895, ch. 174.

Cases cited and approved: *State v. Alston*, 94 Tenn., 674; *English v. Crenshaw*, 120 Tenn., 531; *Knox v. Emerson*, 123 Tenn., 409; *Crenshaw v. Moore*, 124 Tenn., 528.

2. SAME. On estates passing under will or statute only where decedent was seized or possessed of the whole estate at his death.

The statute (Acts 1893, ch. 174), imposing an inheritance tax on estates passing, either by will or statute, from any person dying seized and possessed thereof, to the living, imposes a tax only where the person dying is seized or possessed of the whole estate at the time of his death. (*Post*, pp. 369-398.)

Acts cited and construed: Acts 1893, ch. 174.

Case cited and approved: *Hoge v. Hollister*, 2 Tenn. Chy., 606.

3. ESTATES. Tail, general and special, have been abolished; origin and creation of estates in fee.

Estates tail, general and special, have been abolished by statute in this State; but the estate in fee created by our modern deed has its origin in the ancient feoffment. (*Post*, p. 399.)

Code cited and construed: Sec. 3673 (S.); sec. 2813 (M. & V.); sec. 2007 (T. & S. and 1858).

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4. SAME. Title in fee includes all interest and right.

A "title in fee" is a full and absolute estate, beyond and outside of which there is no other interest or even show of right. (*Post*, p. 399.)

Case cited and approved: *Earnest v. Land & Lumber Co.*, 109 Tenn., 435.

5. STATUTE OF FRAUDS. "Sale" means alienation, and includes parol gift or donation of land.

The word "sale" in our statute of frauds (section 3142 of Shannon's Code) means alienation; and an action on a parol contract made by the owner, binding him to give or donate land to another, would fall within the terms of that statute; for it does not in terms denounce as void *ab initio* a contract made in contravention of its terms with respect to alienation of lands. (*Post*, pp. 399, 400.)

Code cited and construed: Sec. 3142 (S.); sec. 2423 (M. & V.); sec. 1758 (T. & S. and 1858).

6. SAME. Parol sale of land is only voidable at election of either party, and may be specifically enforced if statute is not pleaded.

A parol contract for the sale of land is not absolutely void, but only voidable under the statute of frauds at the election of either party; and such contract may be specifically executed as against either party if he fails or refuses to plead the statute, or to insist or rely upon it. (*Post*, pp. 400-402.)

Code cited and construed: Sec. 3142 (S.); sec. 2423 (M. & V.); sec. 1758 (T. & S. and 1858).

Cases cited and approved: *Sneed v. Bradley*, 4 Sneed, 304; *Hudson v. King*, 2 Helsk., 573; *Jennings v. Bishop*, 3 Shannon's Cases, 138; *Brakebill v. Anderson*, 87 Tenn., 209; *Slatton v. Tennessee Coal, Iron & Railroad Co.*, 109 Tenn., 425.

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7. **SAME.** Must be specially pleaded, to be available as a defense.

The statute of frauds must be specially pleaded, to be available as a defense to an action to enforce a parol contract for the sale of land. (*Post*, p. 401.)

Code cited and construed: Sec. 3142 (S.); sec. 2423 (M. & V.); sec. 1758 (T. & S. and 1858).

Cases cited and approved: *Brakefield v. Anderson*, 87 Tenn., 209; *Citty v. Manufacturing Co.*, 93 Tenn., 280; *Phillips v. Kimmons*, 94 Tenn., 567; *King v. Coleman*, 98 Tenn., 571.

8. **SAME.** Parol sale of land may be avoided by vendor's heirs; but until its repudiation, the vendee in possession holds for himself.

While a parol sale of land is voidable after the death of the vendor at the election of his heirs, and they may recover possession by appropriate proceedings, subject to all the legal consequences flowing from a disaffirmance and rescission of the parol contract, made by the vendor, yet during the currency of the parol contract, and until it is repudiated, the vendee in possession holds for himself, and not as tenant of the vendor. (*Post*, pp. 402, 405, 406.)

Cases cited and approved: *Vaughn v. Vaughn*, 100 Tenn., 285; *Slatton v. Tennessee Coal, Iron and Railroad Co.*, 109 Tenn., 425.

9. **SAME.** Parol donee stands on a parity with a parol vendee. A parol donee of land stands, in legal contemplation, on a parity with a parol vendee, for the "purchase" of land, as contradistinguished from acquisition by inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the mere operation of law, embraces every other method of coming into the possession of an estate, and includes a gift of land. (*Post*, pp. 402-404.)

Case cited and approved: *King v. Coleman*, 98 Tenn., 566.

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- 10. SAME.** Parol gift and adverse possession may ripen into defensive right, and before that period are not void, but merely voidable.

The donee's entry into possession of land under a parol gift and his continuous adverse possession thereof for the period of seven years will create in him a defensive right to the land, which is good against the donor or his heirs; and while before such adverse possession has ripened into such defensive right, such donee's right is limited and qualified, and subject to be terminated by voluntary abandonment or surrender of the possession and the donor's re-entry into possession, or by suit, yet the parol gift and possession under it are not to be treated as acts void in law, and as if they had not been done, but merely as voidable. (*Post*, pp. 404-406.)

Code cited and construed: Sec. 4458 (S.); sec. 3461 (M. & V.); sec. 2765 (T. & S. and 1858).

Acts cited and construed: Acts 1819, ch. 28, sec. 2.

Cases cited and approved: *Haynes v. Jones*, 2 Head, 373; *Keys v. Keys*, 11 Heisk., 430, 431; *O'Neal v. Breechen*, 5 Bax., 605; *Jordan v. Maney*, 10 Lea, 145, 146; *Moore v. Burrow*, 89 Tenn., 104; *Kittel v. Steger*, 121 Tenn., 410.

- 11. INHERITANCE TAXES.** Land taken and adversely held under parol gift does not pass under a devise to the donee so as to be subject to inheritance taxes.

Where a testator devised land to his nephew, and thereafter made a parol gift of the land to him, with the right of immediate possession, which was taken by the nephew and held adversely and undisturbedly until the death of the testator a few months later, without making any change in his will, it will be held that the testator was not "seized" or "possessed" of the land at the time of his death, within the meaning of the statute (Acts 1893, ch. 174) imposing a tax upon property passing by will. (*Post*, pp. 395, 397, 398, 406, 407.)

Acts cited and construed: Acts 1893, ch. 174.

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Cases cited and approved: *Kincaid v. Brittain*, 5 Sneed, 120; *Kenney v. Norton*, 10 Heisk., 387; *Mette v. Dow*, 9 Lea, 97; *Williams v. Burg*, 9 Lea, 459.

12. **SAME.** Pleading and Practice. Suit to recover inheritance taxes upon a devise will not authorize a recovery upon a parol gift to the devisee, when.

Where the suit in behalf of the State for the recovery of inheritance taxes is, by the pleadings, predicated wholly upon the devise as passing the whole estate in the land, and treating the testator's parol gift of the land to the devisee, and his adverse possession thereunder, as absolutely void, the State cannot recover the taxes upon the parol gift, upon the ground that it falls within the statute as a conveyance made in contemplation of death; for there can be no recovery on a predicate outside of and inconsistent with the scope of the plaintiff's pleadings. (*Post*, pp. 398, 407.)

FROM MONTGOMERY.

Appeal from the Circuit Court of Montgomery County.
—W. L. COOK, Judge.

ATTORNEY-GENERAL CATES and JNO. T. CUNNINGHAM,
JR., for State.

H. N. LEECH, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

This suit was brought for the use of the State of Tennessee for the purpose of collecting from the defendant

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\$635.75, claimed on behalf of the State as a collateral inheritance tax on certain land in Montgomery county, Tennessee, to which the State insists that the defendant acquired title under item 4 of the will of Patrick Henry, deceased, which item reads:

"4. I give to my nephew, Gustavus A. Henry, the plantation in Montgomery County, Tenn., which I bought from E. W. Barker and wife, which is known as part of the dower tract of Cloverlands."

The statute on which the suit is based is chapter 174, Acts of 1893, and so far as necessary to be set out is:

"That all estates—real, personal and mixed—of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State, passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this State, or any part of such estate or estates or interest therein, transferred by deed, grant bargain, gift or sale, made in contemplation of death or intended to take effect in possession or enjoyment after the death of the grantor or bargainor to any person or persons or to bodies corporate or politic, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children, and lineal descendants born in lawful wedlock of the person dying seized and possessed thereof, shall be, and they are hereby, made subject to a duty or tax," etc.

The defendant was successful, both in the county court and on appeal therefrom in the circuit court, and from the judgment of the latter the plaintiff appealed to

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this court, and has made four assignments of error, raising, however, only one question, which is, was the judgment appealed from erroneous?

The act whereon the suit is based must be strictly construed against the State and in favor of the taxpayer. *State v. Alston*, 94 Tenn., 674, 30 S. W., 750, 28 L. R. A., 178; *Knox v. Emerson*, 123 Tenn., 409, 131 S. W., 972; *English v. Crenshaw*, 120 Tenn., 531, 110 S. W., 210, 17 L. R. A. (N. S.), 753, 127 Am. St. Rep., 1025; *Crenshaw et al. v. Moore et al.*, 124 Tenn., 528, 137 S. W., 924, 34 L. R. A. (N. S.), 1161. In the construction of the statute on which the suit is based, the meaning of the word "estate" is to be determined. Lord Coke defines the word thus: "State or estates signifieth such inheritance, or freehold, term for years, tenancie by statute merchant, staple eliget, or the like, as any man hath in lands or tenements." Co. Lit., 345a. "An estate in lands, tenements or hereditaments signifies such an interest as the tenant has therein." *Hoge v. Hollister*, 2 Cooper, Chancery Reports, 606. The words of the statute, "passing from any person who may die seized or possessed of such estates," mean that the person dying must be seized or possessed, at the time of death of the whole estate or interest on which the statute seeks to fix the tax, as it is the privilege of succession to the whole estate which passes by the will, or under the law of descent, which this portion of the statute seeks to tax in the hands of the successor to the testator or decedent as the case may be.

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So much of the statute as we have thus construed applies to estates which pass from the dead to the living by will, or by the statute of descent. The remaining portion of the statute seeks to tax the whole or any part of an estate or estates transferred by the owner by deed, grant, bargain, gift, or sale, while in life, but made in contemplation of death, or intended to take effect in possession or enjoyment after the death of the grantor or bargainor.

The facts to which the statute as construed must be applied in this case are as follows: Patrick Henry, the testator, was the uncle of the defendant. The testator made his will on October 18, 1905, in which appears the devise of the land to defendant already set out. Upon the occasion of the birth of a daughter to the defendant, the testator named the child after his mother, Marion McClure, and in honor of the birth of the child, and the name which he was permitted to bestow upon her, the testator made a parol gift to the defendant of the same tract of land which he had devised to the defendant by his will. This parol gift was made on February 28, 1908. By the gift defendant was authorized to take immediate possession of the land as his own property. Defendant did take possession of it, made a crop on it during the year 1908, paid the taxes on it for that year, claimed it as his own, and adversely to the donor, all of which facts were known to the donor, and the latter stated to third parties that he had given the land to the defendant, and the donor never disputed the defendant's right to the land between the date of the parol gift and

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the date of the donor's death, which occurred on November 23, 1908. He died, leaving his will unchanged, by which will he had devised the land to the defendant.

Just here it must be noted that this suit is predicated wholly upon the devise contained in the will, and not at all upon any disposition of the land made by the donor while in life in favor of the defendant, so that, as we have construed the statute, the plaintiff's case must stand or fall upon its insistence that, notwithstanding the parol gift, the whole estate of which the defendant is now seized and possessed in the land passed to and became vested in him by the fourth clause of the will of the testator.

The vital question being thus sharply drawn, the *quantum* of estate in the land which was vested in the testator at the time of his death would seem to be the controlling question. In the chapter which discusses alienation by deed and the common assurances of title of the kingdom, Mr. Blackstone mentions feoffment, and of it says: "It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved, and it may properly be defined as the gift of any corporeal hereditament to another. He that so gives or enfeoffs is called the feoffor, and the person enfeoffed is denominated the feoffee." By this ancient method the estate in fee in land was first created, and was distinguished from the conveyance by gift (*donatio*) only in that by enfeoffment an estate in fee may be created, but by the conveyance by gift (*donatio*) an estate tail alone could be

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created. The operative words of each form of conveyance were the same, "do" or "*dedi*." Estates tail, general and special, by our statute of 1784 (chapter 22, section 5), now appearing as section 3673, Shannon's Code, were abolished; but the estate in fee created by our modern deed has its origin in the ancient feoffment. Now of this estate Mr. Blackstone says:

"But by the mere words of the deed the feoffment is by no means perfected. There remains a very material ceremony to be performed, called livery of seizin, without which the feoffee has but a mere estate at will. This livery of seizin is no other than the pure feudal investiture, or delivery of corporeal possession of the land or tenement, which was held absolutely necessary to complete the donation. '*Nam feudum sine investitura nullo modo constitui potuit.*' And an estate was then only perfect when, as the author of Fleta expresses it in our law, '*Fit juris et seisinæ conjunctio.*'"

And this court has defined a title in fee to be "a full and absolute estate, beyond and outside of which there was no other interest or even shadow of right." *Earnest v. Little River Land & Lumber Co.*, 109 Tenn., 435, 75 S. W., 1122.

The word "sale" in our statute of frauds (section 3142, Shannon's Code) means alienation, and an action on a parol contract made by the owner, binding him to give or donate land to another, would, we think, fall within the terms of that statute. A contrary holding would open a wide door to perjury and fraud, and defeat, as we think, one of the purposes of the statute.

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But our statute of frauds does not in terms denounce as void *ab initio* a contract made in contravention of its terms with respect to the alienation of lands. It only bars any action on such contract, and the statute is operative to defeat such a contract only when interposed by one of the parties, and such contract may be enforced by the consent and upon the application of the parties to it, and so long as it is recognized, affirmed, and adhered to by the parties, it cannot be annulled by voluntary action of the courts, as has been held by this court, where a parol sale of land was involved, in the case of *Brakefield v. Anderson*, 87 Tenn., 209, 10 S. W., 360. Contrary holdings may, of course, be found in those jurisdictions where the statute by its terms makes all contracts void which contravene its provisions. But in *Brakefield v. Anderson*, *supra*, it was further said:

“The sounder view is that a verbal sale of land is not void *ab initio*, but only voidable at the election of either party, and not enforceable by one against the will of the other, who abandons or repudiates it.

“A parol contract for the sale of land is not absolutely void, for it may be specifically executed as against either party if he fails or refuses to rely upon the statute; and if the parties themselves choose to execute the contract, third parties cannot object.” *Jennings v. Bishop* (Nashville, Dec., 1883), 3 Shan. Cas., 138.

“The doctrine is now well established that, upon a bill for the specific execution of such a contract, if the contract be fully set forth in the bill, and the defendant admits it in his answer, and submits to waive the statute

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of frauds, or, what is deemed equivalent to a waiver, does not insist upon the statute as a defense, a specific performance of the contract will be decreed." *Sneed v. Bradley*, 4 *Sneed*, 304; *Hudson v. King*, 2 Heisk., 573.

"As we have seen, Judge Cooper puts the same doctrine more briefly in these words: . . . 'It (the parol contract) may be specifically executed as against either party if he fails or refuses to rely upon the statute.' *Jennings v. Bishop*, supra.

"Both parties come with appropriate pleading and say they want their contract carried out. When this is done, the reason of the statute—the prevention of fraud and perjury—ceases, and the chancellor, instead of setting the contract aside, should decree its specific execution; the case being one in other respects (as this one is) justifying specific performance by a court of equity."

Since the decision in *Brakefield v. Anderson*, supra, the doctrine there announced that parol contracts for sale of land were not void but merely voidable, under our statute of frauds, has been repeatedly reaffirmed by this court, and in one of these cases it has also been held, in respect of parol sales, that the statute of frauds must be specially pleaded whenever it is desired to rely upon it as a defense. *Citty v. Manufacturing Co.*, 98 Tenn., 280, 24 S. W., 121, 42 Am. St. Rep., 919. And that the administratrix of a vendee in a parol sale cannot disaffirm and rescind the sale when the vendor and the heirs of the vendor do not desire rescission, but prefer to consummate and complete it. *Phillips v. Kimmons*, 94 Tenn., 567, 29 S. W., 965.

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In another of these cases the court said: "True it is that a parol sale of land is voidable only, and not void, and that independent third parties cannot intervene to prevent its completion and enforcement, when the vendee is in possession, and both he and the vendor are ready, able and willing to comply with its terms." *King v. Coleman*, 98 Tenn., 571, 40 S. W., 1082.

But it has also been held that a parol sale is voidable after the death of the vendor at the election of his heirs, and they may recover possession by appropriate proceedings, with, however, all the legal consequences flowing from a disaffirmance and rescission of the parol contract made by the vendor. *Vaughn v. Vaughn*, 100 Tenn., 285, 45 S. W., 677. In another case, after reaffirming the doctrine of *Brakefield v. Anderson*, that there may be a specific performance enforced against either party to a parol contract if he fails or refuses to rely on the statute of frauds, this court held: "Moreover, under the uniform holding of this court, during the currency of the parol contract, and until it is repudiated, the vendee in possession holds for himself, and not as tenant of the vendor." And after a citation of the authorities sustaining the above quotation, the court said: "In some of our cases the vendee has been likened to a quasi tenant of the vendor, but in those cases the parol sale had been repudiated." *Slatton v. Tennessee Coal, Iron & R. R. Co.*, 109 Tenn., 425, 75 S. W., 928.

Plaintiff insists that a parol donee of land does not, in legal contemplation, stand upon a parity with a parol vendee, and that the decisions we have noticed have no

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application to this case, because, as he says, the cases referred to were based upon equitable considerations. We cannot assent to this proposition. We think the cases referred to are based wholly upon the legal rights of the parties as this case is. At common law the word "purchase" in its largest and most extensive sense is defined by Littleton to be the possession of lands and tenements which a man hath as by his own act or agreement, and not by descent by any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate but merely that of inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law. And says Mr. Blackstone: "Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are to be obtained by way of bargain and sale for money, or some other valuable consideration; but this falls far short of the legal idea of purchase, for if I give land freely to another, he is in the eyes of the law a purchaser, and falls within Littleton's definition, for he comes to the estate by his own agreement; that is, he consents to the gift."

An extensive array of authorities, collated in the seventh volume, p. 5853, of Words and Phrases, under the heading "Purchase," shows that the common-law definition of "purchase," as applied to land, has obtained general sanction in the courts of this country. And this court has said that, "as between grantor and grantee, the title passes as contemplated by terms of the

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deed, whether the conveyance be with or without consideration, and whether it be made in good faith or for a fraudulent purpose. The title is not revested in the grantor by the mere nonclaim of the grantee, and the nonexchange of possession." *King v. Coleman*, 98 Tenn., 566, 40 S. W., 1083.

The act of the donor in making the parol gift, and the act of the donee in the acceptance thereof, and his entry into possession of the land thereunder, and his claim of right and title to the land adverse to the donor and his heirs, is not in contravention of the terms of the statute of frauds, or any other law, nor a breach of public policy or good morals. The only effect of the statute of frauds on such a transaction is to bar the maintenance of a suit or action based on such parol donation. When the statute has done this it has performed its full function and purpose. By lapse of seven years' time, and possession by the donee, continuous and adverse to the donor and his heirs, a defensive right to the land may pass from the donor to the donee, under and by virtue of the second section of our act of 1819 (chapter 28), now carried as section 4458 of Shannon's Code. Between the date of the donee's entry under the parol gift, and the time when, under the above statute, his adverse possession has ripened into a defensive right to the land, his right is a limited and qualified one, subject to be disaffirmed and destroyed, either by his voluntary abandonment and surrender of the possession, and a re-entry into possession by the donor or his heirs, or by proper proceeding at law or equity effectually prosecuted for

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the purpose of terminating his rights and possession under the parol gift. Now, to say that the act of the donor in speaking the words of gift, which authorize the act of entry into possession by the donee, and that the act of the donee in entering under the parol gift, are acts void in law, and to be treated as if they had not been done, is going beyond any requirement of the statute of frauds, and beyond the legal effect of its provisions.

It is well settled that these acts of the donor and donee, *viz.*, the parol gift and the consequent entry and continuance of adverse possession by the donee, do by the lapse of seven years ripen into a defensive right to the land in the donee, which is good against the donor or his heirs. *O'Neal v. Breechen*, 5 Baxt., 605; *Haynes v. Jones*, 2 Head, 373; *Keys v. Keys*, 11 Heisk., 430-431; *Jordan and Ransom v. Maney*, 10 Lea, 145, 146; *Moore v. Burrow*, 89 Tenn., 104, 17 S. W., 1035; *Kittel v. Steger*, 121 Tenn., 410, 117 S. W., 500, and other authorities there cited.

The only one of our cases in which we have noticed a direct holding that a parol sale is void is *O'Neal v. Breechen*, *supra*. The result, however, reached in that case, was inconsistent with the holding that the sale was void; for it was also held in that case that parol declarations of the donor, tending to show a rescission of the gift, were incompetent, on the ground that at the time of the making of the declaration the donor was not the owner of the thing given (the land), and that he could not by parol declaration relieve the donee of a

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charge for advancement. And it was held, further, that to so much of the land as the parol donee held and occupied by actual inclosure and claimed adversely in the lifetime of his father, under the gift, for a period of seven years, the donee had acquired a possessory right, and should account for at the estimated value of the land at the time of the gift. We think the word "void" was inadvertently used in the opinion, and that "voidable" was the word which would have expressed the real meaning of the court and the learned author of the opinion.

Now and finally under our construction of the statute, on which this suit is based, the donor and testator, Patrick Henry, was not seized or possessed of the estate in the land devised to the defendant at the time of his death within the meaning of the act. Under our decisions, a covenant of seizin in a deed for land is an assurance to the purchaser that the vendor has the very estate, in quantity and quality, which he purports to convey. It imports, and seizin in law exacts, a perfect title, and is not fulfilled by a transfer to the purchaser of an actual seizin. *Kincaid v. Brittain*, 5 Sneed, 120; *Kenney v. Norton*, 10 Heisk., 387; *Mette v. Dow*, 9 Lea, 97; *Williams v. Burg*, 9 Lea, 459. Prior to his death the testator had given the land in question to defendant, had surrendered to defendant possession of it, and had acknowledged defendant to be the owner of it. After doing this, had the testator conveyed this land to a person other than the defendant, and embraced in his deed the usual covenants of seizin, these covenants under our

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decisions would have been held to be breached by him at the moment the deed was delivered; for by his acts in respect of the parol gift it is clear that between himself, and such seizin and possession of the land as would be required of him under such covenant, he had erected a barrier of adverse possession and claim of right in the defendant, which, to be sure, he or his heirs could have destroyed by appropriate legal or equitable proceeding within the time limited by law, or which would have also been destroyed by voluntary abandonment of the possession by the donee and re-entry by the donor, but by nothing short of these things.

Thus disseized and dispossessed of the land, the testator died, ratifying by his last will all that he had done while in life by the parol sale. The State cannot on this record predicate a right to recover on the parol gift by claim that it falls within the statute as a conveyance made in contemplation of death, because by its pleadings this suit is put entirely on the contrary proposition that the will passed the whole estate in the land, and that the parol gift was void, and that it, and everything done under it, should be held in law as not done.

There can be no recovery on a perdicte outside of and inconsistent with the scope of the plaintiff's pleadings. The judgment of the circuit court must be affirmed.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY v. JOHN B.
HERB.

(*Nashville*. December Term, 1911.)

1. **ADMINISTRATION.** One sued by administrator may petition to revoke letters of administration granted without jurisdiction.

A railroad company, when sued by an administrator for the wrongful death of his intestate, has such interest in the administration of the estate of the decedent as entitles it to file and maintain a petition to revoke the letters of administration, upon the ground that the county court was without jurisdiction to grant them; and such proceeding is the only way in which the validity of the letters of administration can be questioned. (*Post*, pp. 411-413, 418, 419.)

2. **SAME.** Appointment of administrator by county court cannot be collaterally questioned.

The appointment of an administrator by the county court is voidable only, and cannot be attacked collaterally. (*Post*, p. 413.)

Cases cited and approved: *Railroad v. Mahoney*, 89 Tenn., 312; *Franklin v. Franklin*, 91 Tenn., 131; *Reeves v. Hager*, 101 Tenn., 712.

3. **SAME.** On estate of a deceased nonresident cannot be granted here to sue for wrongful death caused in another State, by a corporation of that State.

The right of action which a personal representative has against a railroad company, a corporation of another State, for the wrongful death of his intestate caused by it in that State, is not an "asset," "estate," or claim in which the decedent's estate is interested, within the meaning of the statute (section 3935 of Shannon's Code), authorizing letters of administration upon the estate of a nonresident in a county where he had assets or

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where any debtor resides, etc.; for the right of action for a wrongful death is continued and preserved, not for the benefit of the estate of the decedent, but expressly and solely for that of the widow, children, or next of kin. (*Post*, pp. 413-416, 418, 419.)

Code cited and construed: Secs. 3935-3937, 4025, 4026 (S.); secs. 3043-3045, 3130, 3131 (M. & V.); secs. 2203-2205, 2291, 2292 (T. & S. and 1858).

Acts cited and construed: Acts 1831, ch. 24; Acts 1841-42, ch. 69; Acts 1871, ch. 78; Acts 1883, ch. 186.

4. SAME. "Assets" of estates of decedents include only property subject to debts.

"Assets," within the meaning of our administration laws, include only property subject to the payment of the indebtedness of decedents, and do not even include property which they owned and which is exempt in favor of the widows and infant children. (*Post*, p. 416.)

Cases cited and approved: *Hall v. Railroad*, 102 Ky., 484; *Railroad v. Swayne*, 26 Ind., 483.

5. SAME. Debts due estates of decedents are assets for administration in the jurisdiction where the debtor resides.

The general rule is that all simple contract debts and other claims of less dignity, due the estates of decedents from others, are assets for administration in the jurisdiction where the debtor or party liable therefor resides, and for a stronger reason is this the rule where the decedent and his debtor both reside in the same jurisdiction. (*Post*, pp. 416-418.)

Cases cited and approved: *Swancy v. Scott*, 9 Humph., 330; *Young v. O'Neal*, 3 Sneed, 55.

6. SAME. Debt that fixes jurisdiction is defined to be a fixed or specific sum due by contract; and not damages for wrongful death.

The word "debt," within the meaning of the statute (section 3935 of Shannon's Code) authorizing administration upon the estate of a deceased nonresident in a county where a debtor to

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such estate resides, means a fixed or specific sum due by contract, and does not include unliquidated damages recoverable in an action for tort; and a claim for damages growing out of a wrongful death is not a debt. (*Post*, pp. 418, 419.)

Code cited and construed: Sec. 3935 (S.); sec. 3043 (M. & V.); sec. 2203 (T. & S. and 1858).

FROM DAVIDSON.

Appeal from the County Court to the Circuit Court of Davidson County, and appeal from such Circuit Court to the Court of Civil Appeals, and by writ of *certiorari* from the Court of Civil Appeals to the Supreme Court.—
THOMAS E. MATTHEWS, Circuit Judge.

JOHN BELL KEEBLE, ED. T. SEAY and F. M. BASS, for Railroad.

PITTS & M'CONNICO, W. H. WASHINGTON and J. G. LACKEY, for Herb.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

This case was begun by petition filed by the Louisville & Nashville Railroad Company, in the county court of Davidson county, to revoke letters of administration granted by that court to Jno. B. Herb upon the estate of Leo F. Herb, deceased, because it had no jurisdiction or authority to grant the same.

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The allegations of the petition are that the Louisville & Nashville Railroad Company is a corporation created and organized under the laws of the State of Kentucky, having offices and agents in that State, and also in Davidson county, Tennessee, and that Leo F. Herb, deceased, was, previous to August 10, 1910, a citizen and resident of Hopkins county, Kentucky, and there received injuries from which he there died; that on August 10, 1910, the defendant, John B. Herb, applied for and was granted letters of administration upon the estate of said Leo F. Herb by the county court of Davidson county, and upon the same day, as such administrator, brought suit against the petitioner in the circuit court of Davidson county for \$25,000 damages for the alleged wrongful and negligent killing of his intestate, which is pending in said court.

It is further alleged that Leo F. Herb at the time of his death, and when said letters of administration were applied for and granted, had no goods, chattels, assets, or any estate, real or personal, in Davidson county, nor any debtor or debtor of a debtor residing in said county, and that there was no suit to be brought, prosecuted, or defended in said county in which his estate was interested. It is charged upon these facts that the county court of Davidson county was without jurisdiction to grant letters of administration upon the estate of the decedent, and that the same should be recalled and revoked. The prayer is for this special relief and for general relief.

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The defendant demurred to the petition upon several grounds, but only two questions are presented for determination. The first is whether the petitioner has such interest in the administration of the estate of the decedent as entitles it to maintain this proceeding; and the other is whether or not the right of action growing out of the alleged negligent killing is an asset of the estate of the decedent, in this State, sufficient to give the county court of Davidson county jurisdiction to appoint an administrator of his estate.

The demurrer was sustained by the county and the circuit courts, but was held bad by the court of civil appeals, and the case is now before this court upon a petition for *certiorari* to review the action of the latter court.

We are of opinion that the petitioner has such interest in the administration of the estate of Leo. F. Herb to entitle it to prosecute this proceeding. John B. Herb has sued the petitioner in the capacity of administrator of the estate of the decedent. If he was not lawfully appointed, the petitioner has the right, in a proper way, to show that fact, and thus defend itself from being harassed by a suit brought without authority of law, and from complications that may arise, should his letters of administration be revoked, upon the application of some one interested in the estate of the decedent as a creditor, next of kin, or otherwise.

The right of a plaintiff to maintain an action in the capacity he sues, or to sue in a particular court or jurisdiction, may always be challenged by a defendant,

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although he may be liable for the wrong sought to be redressed in a suit brought in a proper court, by the proper party. This proceeding is the only manner in which the validity of letters of administration can be called into question. The appointment by the county court is voidable only, and cannot be attacked collaterally. *Railroad Co. v. Mahoney*, 89 Tenn., 312, 15 S. W., 652; *Franklin v. Franklin*, 91 Tenn., 131, 18 S. W., 61; *Reeves v. Hager*, 101 Tenn., 712, 50 S. W., 760.

In support of the other question presented for the defendant, it is said that the right of action which the personal representative of Leo F. Herb has against the petitioner for the alleged unlawful killing of the decedent is assets or estate of the decedent, or a debt due decedent, within the meaning of our Code, section 2203, subsections 1 and 2, and that the action to recover the same is a suit in which his estate is interested, within the meaning of subsection 4 of said section, sufficient to confer upon the county court of Davidson county jurisdiction to grant letters of administration upon the estate of the decedent. We cannot agree to this contention.

The jurisdiction of the county courts of this State to appoint administrators upon the estates of citizens and residents of other States and foreign countries has been the subject of legislation, and can be exercised only in the cases provided by that legislation. It is to be found in Code, sections 2203-2205 (Shannon's Ed., sections 3935-3937). Section 2203 is in these words:

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“Sec. 2203. Nonresident’s Estate—Administration.— Letters testamentary or of administration may be granted upon the estate of a person who resided, at the time of his death, in some other State or territory of the Union, or in a foreign country, by the county court of any county in this State.

“(1) Where the deceased had any goods, chattels, or assets, or any estate, real or personal, at the time of his death, or where the same may be when said letters are applied for.

“(2) Where any debtor of the deceased resides.

“(3) Where any debtor of a debtor of the deceased resides, his debt being unpaid when the application is made.

“(4) Where any suit is to be brought, prosecuted, or defended, in which said estate is interested.”

The other sections relate to suits in the chancery and supreme courts, and have no application to this case.

These sections were taken from Acts 1831, ch. 24, and Acts 1841-42, ch 69, enacted at a time when the right of action for personal injuries abated or was extinguished by the death of the injured party, and they could not have been intended to include such claims for damages as assets of the estate of a decedent. We do not think such rights of action are assets or estate of a decedent within the meaning of the statutes. The action, if any, which the personal representative of Leo F. Herb has against the petitioner for his unlawful killing, is under the statutes of Kentucky where the alleged wrong occurred. There is nothing in the record to show the na-

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ture of those statutes, and we therefore presume that they are similar to those of this State. The first statute of this State upon the subject, enacted in 1851, is carried into the Code of 1858 at sections 2291, 2292, and provides that the right of action which a person, who dies from injuries received from wrongful act or omission, would have against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and if no widow, to his children; or to his personal representative for the benefit of his widow and children, or next of kin, free from the claims of creditors, and that the action may be instituted by the personal representative of the deceased, or if he decline to sue, by the widow and children of the deceased, in his name. In 1871, by an act then passed (Acts 1871, ch. 78) the widow is authorized to sue in her own name, and, if there be no widow, the children may sue in their name. And by an act passed in 1883 (Acts 1883, ch. 186) plaintiffs in such cases are given the right to recover the damages which they may sustain in consequence of the death of the decedent in addition to those which the decedent could have recovered had he survived his injuries. Rights of action accruing to an injured party for torts to the person, under the common law, were extinguished by his death. While these statutes change this rule and preserve or continue the right, it is not for the benefit of the estate of the decedent, but expressly and solely for that of the widow, children, or next of kin.

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The administrator, it is true, is authorized by the statute to sue, but it is as trustee for the widow and next of kin. He cannot sue for the benefit of the estate. That the suit can also be brought by the widow, and in the absence of a widow, by the children in their own name, and that the recovery is not only for the damages done to the decedent, but also for those sustained by the widow and children, or next of kin, conclusively repel the idea that the right of action is an asset of the estate of the decedent.

It is well settled that assets, within the meaning of our administration laws, include only property subject to the payment of the indebtedness of decedents. They do not even include property which he owned and exempt in favor of the widow and infant children.

This question has not before been presented to this court, but has been passed upon by the courts of last resort in Kentucky and Indiana, and there held in accordance with this opinion. *Hall's Adm'r v. L. & N. R. R. Co.*, 102 Ky., 484, 43 S. W., 698, 80 Am. St. Rep., 358; *Jefferson R. R. Co. v. Swayne's Adm'r*, 26 Ind., 483.

But if a claim for damages growing out of the alleged killing of one by the wrongful act of another was assets of the estate of the deceased within the meaning of our statutes or those of Kentucky, the county court of Davidson county was without jurisdiction in this case.

The general rule is that all simple contract debts and other claims of less dignity, due the estates of decedents from others, are assets for administration in the juris-

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diction where the debtor or party liable therefor resides. *Swancy v. Scott*, 9 Humph., 330.

The Louisville & Nashville Railroad Company is a corporation created and organized under the laws of the State of Kentucky. It has its domicile and offices and agents in that State, and there operates a railroad. The decedent, Leo F. Herb, was a citizen and resident of that State, was there injured, and there died. The cause of action which arose from his alleged wrongful killing is one for unliquidated damages. The jurisdiction, therefore, to grant letters of administration upon the estate of the decedent to prosecute this right of action, is solely in the probate courts of Kentucky.

Our statutes were enacted to provide for the administration of the estates of nonresident decedents found in this State, because the personal representative appointed in the State where the decedent resided at his death has no authority here. It was not intended that the courts of this State should assume jurisdiction of assets of citizens and residents of other States and within the jurisdiction of their courts. The comity which prevails among the several States forbids such construction.

In *Young v. O'Neal*, 3 Sneed, 55, it was held that the executor of a decedent in the State of Illinois could not collect a note due his intestate from a citizen of this State, and here at the time of the death of the testator. But it is said: "If the debtor and creditor both reside in the same country at the time of the creditor's death,

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and an administration is taken out in that country, in such case as the debt is properly due there, it rightfully falls within that administration." Or, in other words, where the debtor and creditor reside in the same State, the debt is assets of the decedent in that State.

The right of action in question cannot have a *situs* and be assets in more than one State, and being in Kentucky, and within the jurisdiction of the courts of that State, it is clear that it is not within the jurisdiction of the courts of this State.

The claim for damages growing out of the death of a decedent is not a debt. That term is applied to a fixed or specific sum due by contract, and not to unliquidated damages recoverable in an action for a tort. But, if it was a debt, what we have said above is conclusive that its *situs* is in Kentucky, where the creditor and debtor both resided at the death of the former.

It follows from what has been said that subsection 4 of section 2203 did not authorize the county court of Davidson county to exercise probate jurisdiction in this case, because the estate of decedent is not interested in the suit to be brought by or for his widow, children, or next of kin. This provision was also intended to cover only those cases where it is necessary, in order to protect the estate of the decedent, to bring a suit in this State. The action which it is sought to bring against the Louisville & Nashville Railroad Company for the death of the decedent is one that can as well be brought in the State of Kentucky, by the laws of which it is given, as in this State, and there is no reason it should be brought here.

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It is said that an action for damages for the death of one by wrongful act is transitory, and can be brought anywhere the wrongdoer can be found. This is true, provided there be one authorized to bring the action in the jurisdiction where it is attempted to be instituted. That question, however, has nothing to do with this case. We are here to determine whether the county court of Davidson county had jurisdiction to appoint an administrator of the estate of the decedent and that only. We are of opinion that upon the allegations of the petition, which are taken as true upon demurrer, such jurisdiction did not exist.

Therefore, there is no error in the judgment of the court of civil appeals overruling the demurrer, and the writ of *certiorari* to reverse the same is denied.

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JIM JOHNSON v. STATE.

(*Nashville*. December Term, 1911.)

1. **CRIMINAL LAW.** Misconduct of State's attorney in reading to the jury a memorandum indorsed on indictment showing State's witnesses examined before grand jury is prejudicial and reversible error, when.

Where the first trial of the accused did not occur until more than eight years after the homicide, and his second trial did not occur until five years later, when the attorney of the accused argued that the memory of the witnesses on both sides was likely to be dim and unreliable, and, in reply thereto, the State's attorney made the point that the witnesses for the State were more likely to remember the transaction correctly, because they had testified before the grand jury, and that the facts were thereby impressed on their minds, more deeply than upon the minds of the witnesses for the accused; and, upon objection made to this statement, on the ground that there was no testimony showing the facts of such examination, the State's attorney read to the jury a memorandum on the back of the indictment purporting to show that the witnesses referred to had been examined before the grand jury, to which the attorney of the accused again objected, on the ground that this memorandum had not been put in evidence; whereupon the trial judge ruled that it was competent for the State's attorney to refer to the memorandum simply to show the fact that the witnesses had been so examined, to which ruling, the attorney of the accused objected, but the objection was overruled. *Held*, that such conduct of the State's attorney and the action of the trial court constituted prejudicial and reversible error. (*Post*, pp. 424-427.)

2. **SAME.** Where the evidence shows involuntary manslaughter, an inaccurate, unnecessary, and harmless charge on that subject is not reversible error.

Where all the witnesses, including the accused, testified that the accused shot the deceased, but the accused claimed that he shot

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the deceased because he was advancing on him, with an open knife in his hand, there was no evidence indicating involuntary manslaughter, and a charge on that subject was unnecessary. However, the accused cannot complain of the inaccuracy and needlessness or unnecessariness of such charge, if he was not injured by it. (*Post*, pp. 427, 428.)

3. **SAME.** Charge that self-defense is not available for shooting an intervening peacemaker whose brother was putting accused in danger of death or great bodily harm is proper, when.

The court properly gave in charge to the jury an instruction offered by the State to the effect that if, when the defendant shot the deceased, the latter was not advancing upon him with a knife, but was only interceding as a peacemaker, and had thrown himself between the defendant and his (decedent's) brother to prevent a difficulty, having nothing in his hands, and having no reasonable ground on which to base an honest belief that he was in danger of death or great bodily harm at the hands of the deceased, then he would have no right to shoot the deceased and the plea of self-defense would be unavailable, even though he believed that the decedent's brother was putting him in danger of death or great bodily harm, provided he shot the deceased purposely. (*Post*, pp. 428, 429, 430.)

4. **SAME.** Refusal of requested charge that defendant, without fault, may shoot an intervener trying to disarm him against his aggressive adversary, is erroneous, when.

The court erroneously refused to give a requested charge asked by the defendant to the effect that if the defendant was peaceable and quiet, and did nothing to bring on the difficulty, and the decedent's brother approached and menaced the defendant, so as to cause him to be apprehensive for his life or of great bodily harm, whereupon the deceased undertook to intervene and disarm defendant, when he was faultless, and thus committed an assault upon the defendant which he apprehended put his life in jeopardy, either from the deceased or his brother, then the

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defendant would have the right to act upon such apparent danger, and, if he acted in good faith, he could slay his adversaries in order to save himself from death or great bodily harm. (*Post*, pp. 428-431.)

5. **SAME.** One intervening to disarm the defendant against unlawful assault becomes a *particeps criminis* and may be defended against.

A person who intervenes to disarm a man who is trying to protect himself against an unlawful assault of a third party, which assault puts him in danger of death or great bodily harm, becomes a *particeps criminis* with such third party, and may be defended against in the same manner. (*Post*, p. 431.)

6. **SAME.** Refusal to charge a requested instruction on self-defense that is not strictly accurate is not reversible error; suggested corrections.

Where the accused requested an instruction to the effect that a person who is without fault, when menaced by threatening words and gestures, or by acts *calculated* to cause him to become apprehensive of his safety, and of death or great bodily harm, is not compelled to wait until his adversary strikes him, or even get in a position to slay or strike him; but if the danger is so apparent or imminent, or if he in good faith believes such danger is *apparent*, then he may strike and even take the life of his adversary or antagonist, and he is not compelled to retreat, when a retreat might, on account of the violence of the assault, result in death or great bodily harm to him, such requested instruction is *held* to be correct in the main, but is held to be inaccurate and defective in the use of the word "calculated," for which the phrase "of such nature as" should have been substituted; and after the italicized word "apparent," the words "and imminent" should have been added; and no reversal would be granted for the refusal to charge such inaccurate request, since such instructions must be strictly accurate in order to put the trial judge in error when he refuses to charge the same. (*Post*, pp. 431, 432.)

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7. **SAME.** "Overt act" is defined; proper refusal of requested instruction that certain facts, if found to be true, constitute an "overt act" entitling accused to acquittal.

The term "overt" simply means "open," and in homicide cases an "overt act" is an open act, indicating a present purpose to do immediate great bodily harm, which can be shown in a given case only, by the evidence; for the question of what is an "overt act" is a question of fact, which must be left to the jury in every case, and the jury must judge of it in the light of all the evidence. Therefore, the refusal of the trial court to give in charge to the jury a requested instruction stating that certain facts, if found to be true, would constitute an overt act entitling the accused to a verdict of not guilty, was proper, and not erroneous. (*Post*, pp. 432-434.)

Cases cited and approved: Jackson v. State, 6 Bax., 452; Allison v. United States, 160 U. S., 203.

8. **SAME.** Accused has same right of self-defense against an intervener as against the party, even a brother, in whose behalf the intervention was made.

Where the accused, when he killed the deceased, was in danger of death or great bodily harm at the hands of a brother of the deceased, or honestly believed himself to be so on reasonable grounds, and at that time the deceased intervened and sought to disarm the accused, or approached him with a knife, the accused then had the same right to defend himself against the deceased as against his attacking brother, even though the deceased was intervening in behalf of his brother, because no one, not even a brother, has any right to intervene in behalf of another who is in the wrong; for the right of intervention exists only where it is in behalf of one acting in his rightful self-defense. (*Post*, pp. 434-436.)

Cases cited and approved: Smith v. State, 105 Tenn., 305; Cooper v. State, 123 Tenn., 129-143 (and citations); State v. Greer, 22 W. Va., 800; State v. Brittain, 89 N. C., 481; State v. Cox, 153 N. C., 638; Mitchell v. State, 129 Ala., 23; Wheat v. Common-

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wealth (Ky.), 118 S. W., 264; State v. Hennessey, 29 Nev., 320, 340; Wheatley v. State, 93 Ark., 409; People v. Travis, 56 Cal., 251, 255.

FROM WILLIAMSON.

Appeal from the Circuit Court of Williamson County.
—DOUGLAS WIKLE, Judge.

HENDERSON & HENDERSON and TYLER BERRY, for Johnson.

ATTORNEY-GENERAL CATES, for State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was convicted of voluntary manslaughter at the April term, 1911, of the circuit court of Williamson county, and sentenced to a term of five years' confinement in the State penitentiary. He has appealed and assigned errors.

The judgment must be reversed because of the following error committed on the trial: During the argument before the jury one of the attorneys representing the State made the point that the witnesses for the State were more likely to remember the transaction correctly, because they had testified before the grand jury, and had thereby gotten the facts impressed upon their minds more deeply than had the witnesses for the plaintiff in

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error. This statement was immediately objected to by the attorney for the plaintiff in error, on the ground that there was no testimony showing the fact of such examination of the State's witnesses before the grand jury. Thereupon the attorney then addressing the jury on behalf of the State read to the jury a memorandum on the back of the indictment purporting to show that the witnesses referred to had been examined before the grand jury. Plaintiff in error's attorney again objected, on the ground that this memorandum had not been put in evidence. Thereupon the trial judge ruled that it was competent for the attorney for the State to refer to the memorandum simply to show the fact that the witnesses had been so examined. Plaintiff in error's attorney again objected, but the objection was overruled.

The point was very material, because, owing to the absence of the plaintiff in error from the State, the first trial of the case at the April term, 1906, had not occurred until a period of more than eight years had elapsed from the date of the homicide. Hence the argument on the part of the plaintiff in error's attorney that the memory of the witnesses on both sides was likely to be dim and unreliable, when the second trial occurred at the April term, 1911, and the reply of the attorney for the State before referred to, showing why the memory of the State's witnesses was more likely to be accurate than that of the plaintiff in error's witnesses.

The memorandum on the back of the indictment was not evidence, and should not have been referred to at all. We have no doubt the plaintiff in error's defense

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was seriously injured, and the results of the trial affected, by this action of the attorney for the State and the ruling of the trial judge. The injury would have been a decided one happening at any stage of the trial; but, happening as it did, in the closing address, when the plaintiff in error's attorney had no reply, it must have been even greater, and especially in view of the fact that there was a very great conflict in the evidence. We have read with care the whole record, and we have rarely seen one in which there was greater conflict. According to eyewitnesses who testified for the State, Mike Copeland, the subject of the homicide, was ruthlessly shot down by plaintiff in error while approaching with outstretched hands, begging him not to kill his brother, Marse Copeland, at a time when the latter was not offering to do plaintiff in error any harm, although it is conceded that a few moments before this Marse Copeland had used threatening language to plaintiff in error, and had exhibited a pistol, and had demanded of plaintiff in error that he settle at once a small debt which he claimed the latter owed him. The construction which the State's witnesses gave the matter was that when Marse Copeland advanced, using this threatening language and manner, plaintiff in error receded a few steps, drew his pistol, and said, "Let's fight it out;" that thereupon Marse Copeland stopped, and Mike Copeland interceded for his brother in the manner above stated, and plaintiff in error shot him in the bowels, and said to him, "Now, d—— you, lie down and die;" and, having thus disposed of Mike, he turned his atten-

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tion to Marse, and began shooting at him, and Marse did not shoot until he was then attacked. According to an equal number of eyewitnesses introduced in behalf of plaintiff in error, when Marse came up and made the demand for the debt, and used the threatening language, and exhibited the threatening manner above referred to, Mike Copeland drew a knife from his pocket and at once intervened in behalf of his brother, approaching plaintiff in error with the open knife, and threatening to kill him, and striking at him with his knife, and actually cutting his clothes, and while Mike was so acting the plaintiff in error shot him and killed him.

In view of this great conflict in the evidence, and the fact that the witnesses were examined on the last trial some fourteen years after the homicide, the point made by the use of the memorandum on the back of the indictment was very important.

Objection was made to the charge of the court as a whole because too meager. We think the requests which the trial judge gave in charge added enough to save the charge from this objection, although it would have been much better if his honor had indicated more clearly the legal rules applicable to the different phases of the case.

It is said the charge was inaccurate upon the subject of involuntary manslaughter. If there was any inaccuracy, it was such as the plaintiff in error could not complain of. Moreover, there was no evidence indicating involuntary manslaughter. All of the witnesses, plaintiff in error included, testified, that plaintiff in er-

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ror shot at Mike Copeland. Plaintiff in error says he shot him because he was advancing on him with an open knife in his hand. The charge upon the subject of involuntary manslaughter was unnecessary, when there was no evidence at all in any way indicating that there had been such involuntary manslaughter. However, the plaintiff in error was not injured by what was said in the charge upon this subject.

It is insisted the court below erred in giving in the charge to the jury the following instruction offered by the State:

"I further charge you that if you find from the proof beyond a reasonable doubt that, at the time the defendant shot Mike Copeland, the latter was not advancing upon him with a knife, but was only interceding as a peacemaker, and had thrown himself between the defendant and Marse Copeland to prevent a difficulty, having nothing in his hands, and that the defendant could see that he had no knife in his hands, and had no reasonable ground on which to base an honest belief that he was in danger of death or great bodily harm at the hands of Mike Copeland, then he would not have the right to shoot Mike Copeland, and the plea of self-defense would not avail him; and this is so, even if he believed that Marse Copeland was putting him in danger of death or great bodily harm, provided he shot Mike purposely."

We think this instruction was properly given.

It is insisted the trial judge committed error in re-

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fusing to give the following special instruction offered by the plaintiff in error:

“I charge you that if you find from the evidence that the defendant was sitting peaceably and quietly, and did nothing to bring on the difficulty in this case, and if you find that Marse Copeland approached the place where the defendant was thus sitting, and menaced him in such language and tones and by such acts as caused the defendant to be apprehensive for his life, or apprehensive of great bodily harm, and if you find that the deceased undertook to intervene and disarm the defendant when the defendant was faultless, and thus commit an assault upon the defendant which the defendant had apprehended put his life in jeopardy, either from Marse Copeland or from the deceased, then the defendant, if he, as I instructed you, was apprehensive for his life or great bodily harm, would have the right to act upon such apparent danger, and, if he acted in good faith, he could slay his adversaries in order to save himself from death or great bodily harm.”

We think this instruction should have been given.

This instruction was based on the case as exhibited by the witnesses for the plaintiff in error, while the instruction set out supra exhibited the case from the standpoint of the State's witnesses. The two, if they had been given, would have instructed the jury upon the two theories, as to each of which there was quite a good deal of evidence.

Under the instruction offered by the State the jury were told that if Mike Copeland was interceding purely

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as a peacemaker, and for that purpose had thrown himself between the contending parties for the purpose of preventing a difficulty, being at the time unarmed, as plaintiff in error could see, and the latter had no reasonable ground upon which to base an honest belief that he was in danger of death or great bodily harm at the hands of this peacemaker, he would not have the right to shoot him on the plea of self-defense, even though he believed that at the time his real adversary, Marse Copeland, was putting him in danger of death or great bodily harm.

In the instruction offered by the plaintiff in error it was asked by the attorney for the latter that the jury be instructed that if, while the plaintiff in error was without fault, and was being assailed by Marse Copeland in such a manner as to cause him to be apprehensive of death or great bodily harm at the hands of the latter, the said Mike Copeland intervened for the purpose of disarming the plaintiff in error, and the latter was at this moment apprehensive for his life or great bodily harm at the hands of Marse Copeland, by reason of the language, tones, and acts of said Marse Copeland, at the time, he would have the right to act upon such apparent danger, and, if acting in good faith, he could slay Mike Copeland, as well as Marse Copeland, in order to save himself from death or great bodily harm. On the hypothesis put in this instruction, Mike Copeland was intervening, not as a peacemaker, but for the purpose of disarming a combatant, who was at the time without fault, and whose life was being put in immediate

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peril at the hands of a third party. A person who thus intervenes to disarm a man who is trying to protect himself against an unlawful assault from a third party, which assault puts him in danger of death or great bodily harm, becomes *particeps criminis* with such third party, and may be defended against in the same manner.

The next instruction offered by plaintiff in error (the seventh) is practically covered by the one which we have just held should have been granted, and, if given in connection therewith, would probably have misled the jury.

The succeeding instruction (No. 8) offered by plaintiff in error was as follows:

“I instruct you that a person who is without fault, when menaced by threatening words and gestures, or by acts calculated to cause him to become apprehensive of his safety, and apprehensive of death or great bodily harm, is not compelled to wait until his adversary strike him, or fell him, or even get in a position to slay or strike him; but if the danger is so apparent or imminent, or if he, in good faith, believes such danger is apparent, then he may strike, and even take the life of his adversary or antagonist, and he is not compelled to retreat when a retreat might, on account of the violence of the assault, result in death or great bodily harm to such defendant.”

This instruction is correct in the main, but is defective in one respect. In the clause “or if he, in good faith, believe such danger is apparent,” to be strictly accurate should read, “or if he, in good faith, believe such danger is apparent” and “imminent.” The word “calculated”

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is also unfortunate. In the connection in which it was used it was meant to be equivalent to the words "of such a nature as." By reason of the defects mentioned, we would not reverse for the refusal to give this instruction, since instructions must be strictly accurate in order to put the trial judge in error, yet, as the case must go back on other grounds, we think it proper to state what we believe to be the correct view.

The trial judge refused to give in charge to the jury plaintiff in error's instruction No. 1, which was as follows:

"If you find from the proof that Marse Copeland came to the crap game and said to the defendant, 'Jim, I want my money you owe me,' and that the defendant told him to come back later, and that an hour and a half or some time later Marse Copeland returned to the card game and asked Jim for his money, and that Jim, the defendant, said he didn't have it, and that Marse then stepped upon the rug or blanket upon which the card game was being played, and said, 'By G——, there shan't be another card game played here until I get my money,' Marse having his right hand in his coat pocket upon his pistol, and that the defendant, Jim Johnson, heard this remark and saw that Marse had his hand upon the pistol, then this act of Marse in stepping upon the blanket with his hand upon the pistol, together with the words, 'By G——, there shan't be another game of cards played here until I get my money,' constituted an overt act upon his (Marse's) part, made Marse Cope-

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land the aggressor, and authorized Jim Johnson in believing that he was in danger of great bodily harm or death. Now, gentlemen, if you find the above to be the facts, and if you further find that the deceased, Mike Copeland, a brother of Marse Copeland, rose to his feet, passed in front of his brother, Marse Copeland, and followed Jim Johnson (who had gotten up and gone backward), and if you believe that Mike Copeland, the deceased, lunged at the defendant, or gripped his hand, and if you further believe that the defendant said to the deceased, 'G—— d—— you, stand back,' or 'Stop, stand back,' and jerked loose from the deceased, and shot, then, in that event, I charge you that your verdict should be not guilty, for the reason that, if the above facts are found by you to be true, that the deceased, Mike, intervening in behalf of his brother, Marse, stands in the shoes of his brother, Marse, and can claim no more protection at the hands of the law than Marse."

As previously stated, an instruction offered must be correct in form and substance in order to put the trial judge in error in refusing it. This instruction is defective. It undertakes to tell the jury what is an overt act. This is a question of fact, which must be left to the jury in every case. *Jackson v. State*, 6 Baxt., 452; *Allison v. United States*, 160 U. S., 203, 16 Sup. Ct., 252, 40 L. Ed., 395. "Overt" simply means "open." In homicide cases an overt act is an open act, indicating a present purpose to do immediate great bodily harm. What this overt act is can be shown in a given case only by the evidence, and the jury must judge of it in the light

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of all the evidence. The court cannot properly say to them that this or that act is an overt act.

As to the residue of the instruction, as a proposition of law, if, indeed, the plaintiff in error was at the moment in danger of death or great bodily harm at the hands of Marse Copeland, or honestly believed himself to be so on reasonable grounds, and at that time Mike Copeland intervened in the manner stated, the plaintiff in error had a right to defend against him the same as against Marse Copeland. This falls within the principle which we have stated in disposing of the sixth instruction offered by the plaintiff in error. This would be true, even though Mike was intervening in behalf of his brother, because under the facts assumed he would stand in the shoes of his brother, and could claim no more protection at the hands of the law than could his brother.

The rule upon this subject is plain and clear. It is so held in our own cases.

A very interesting case upon this subject is *Tom and Robert Smith v. State*, 105 Tenn., 305, 60 S. W., 145. In that case, before the difficulty was over the two Smith brothers and the two Fowler brothers were engaged in a combat, which resulted in the death of the two Fowlers. The original difficulty was between Tom Smith and Bud Fowler. Tom Smith was the aggressor. He brought on the difficulty between himself and Bud Fowler. While he was shooting at Bud Fowler, the latter's brother, Henry Fowler, intervened. Then Bob Smith, the brother of Tom, shot Henry Fowler, who was killed

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by this shot and by other shots immediately delivered into his body by Tom Smith. The court held, on this state of facts, that inasmuch as Tom Smith was in the wrong, his brother, Bob Smith stood in his shoes when he shot Henry Fowler, and was guilty of murder; also that inasmuch as Bud Fowler was properly defending himself against Tom Smith, his brother, Henry Fowler, properly intervened in his effort to prevent Tom Smith from committing murder upon the body of Bud Fowler. It is thus seen in that case both phases were presented. Bud Fowler was endeavoring to defend himself against the felonious aggression of Tom Smith, and Henry Fowler, his brother, joined him in that defense, and under the law was held to be acting properly in his effort to prevent the commission of a felony upon the person of his brother, while Bob Smith, who was aiding his brother in the committing of that felony, stood in the shoes of his brother and was guilty with him.

There is an elaborate discussion of the subject in the opinion of Shields, J., in the case of *Cooper v. State*, 123 Tenn., at pages 129 to 143, inclusive, 138 S. W., 826, which we regard as a sound exposition of the law. We can add nothing to what is there said, except that the principles there laid down are supported, not only by the cases and text-books referred to, but by the great weight of authority elsewhere. In addition to the cases there cited, we refer to the following as in entire accord therewith: *State v. Greer*, 22 W. Va., 800; *State v. Brittain*, 89 N. C., 481; *State v. Cox*, 153 N. C., 638, 69 S. E., 419; *Mitchell v. State*, 129 Ala., 23, 30 South., 348; *Wheat v.*

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Com. (Ky.), 118 S. W., 264; *State v. Hennessy*, 29 Nev., 320, 340, 90 Pac., 221; *Wheatley v. State*, 93 Ark., 409, 125 S. W., 414; *People v. Travis*, 56 Cal., 251, 255.

We deem it necessary to refer to this and other points appearing in the instructions offered because these questions will arise in the next trial.

For the error indicated, the judgment will be reversed, and the cause remanded for a new trial.

Cheatham v. Patterson.

J. L. CHEATHAM v. J. W. PATTERSON.

(Nashville. December Term, 1911.)

1. LIBEL AND SLANDER. Charge of selling intoxicating liquors is not per se slanderous.

A declaration in an action of slander, alleging, in the first count, that defendant said he had bought beer from plaintiff at his store, and, in the second count, that defendant said that he was satisfied plaintiff was selling whisky, and, in another count, that defendant said he had orders from the company which employed him "for the hands not to trade with" plaintiff, because they were purchasing whisky from him, is insufficient to show actionable slander, by a colloquium simply imputing to plaintiff unlawful sales of liquor, without stating such facts and circumstances under which the words were spoken and the situation of the parties, as would constitute a charge of an indictable offense involving moral turpitude, because the plaintiff must affirmatively show that the sales imputed to him were unlawful and indictable at the time the words were spoken, either from the words imputed to defendant, or by a colloquium stating the facts and circumstances under which the words were spoken and the situation of the parties; for all sales of intoxicating liquors are not unlawful in this State. (*Post*, pp. 439-444.)

Case cited and approved: *Kelly v. State*, 123 Tenn., 516.

2. SAME. Special damages must be averred, if the words are not actionable per se.

Where no special damages are averred, the words, alleged to have been spoken, must be actionable *per se*, to entitle the plaintiff to a recovery. (*Post*, p. 440.)

Cases cited and approved: *Smith v. Smith*, 2 Sneed, 473; *Rodgers v. Rodgers*, 11 Heisk., 757.

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3. **SAME.** Declaration must state such extrinsic circumstances as will connect the plaintiff with the alleged defamatory matter.

Where the alleged defamatory words are indefinite or ambiguous, and do not of themselves show that the plaintiff was meant, the declaration must state such extrinsic facts and circumstances as will connect the plaintiff with the alleged defamatory matter. (*Post*, pp. 440, 441.)

Cases cited and approved: *Williams v. Karnes*, 4 Humph., 10; *Smith v. Smith*, 2 Sneed, 473; *Onslow v. Horne*, 3 Wils., 177.

FROM MAURY.

Appeal from the Circuit Court of Maury County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—W. B. TURNER, Circuit Judge.

HATCHER & HATCHER, for plaintiff in error.

PEEBLES & FORGERY, for defendant in error.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

Patterson brought this suit in the circuit court of Maury county against the defendant, Cheatham, for \$5,000 for oral slander. There was a trial before the circuit judge and a jury, which resulted in a verdict of \$375 in favor of the plaintiff, which, upon the suggestion of the court, was remitted to \$250, for which judgment

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was rendered. The defendant appealed to the court of civil appeals, and that court reversed the judgment and remanded the case for a new trial for certain errors committed by the trial judge in his charge. The case is before us for review on a petition for writs of *certiorari* filed by both parties to the judgment of the court of civil appeals.

The alleged slanderous words laid in the first count are that Cheatham "had bought beer from him (Patterson) at his (Patterson's) store," and in the second count that he (defendant) was satisfied that he (plaintiff) "was and had been selling whisky," and in the fifth count that he (defendant) "had orders from the company for the hands not to trade with him (plaintiff) because they were purchasing whisky from him (plaintiff.)" The third and fourth counts are not before us.

All that can be gathered from the colloquium set out in the first count of the declaration with respect to the alleged sale of beer is that the defendant falsely and maliciously charged the plaintiff with the violation of a criminal law of the State by speaking the words set out and concerning him in the presence of divers persons. Likewise, all that is shown in the declaration concerning the speaking of the words to the effect that defendant was satisfied that the plaintiff was and had been selling whisky is the averment that the charge was falsely and maliciously made and imputed to the plaintiff an unlawful act. With respect to the last words quoted above, as laid in the fifth count, it is averred that the defendant falsely and maliciously charged the plaintiff with selling

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whisky without a license, by speaking these words of and concerning him, and, further, that the defendant is foreman of section 9 of the Nashville, Chattanooga & St. Louis Railway, and has charge of the section hands employed on that section; that plaintiff is a merchant doing a general merchandising business at Park Station, in Maury county, Tenn., which is within four miles of a schoolhouse, and defendant's section of railroad is near Park Station. The language set out in the fifth count of the declaration is wholly ambiguous. From the words averred, it cannot be told whether the defendant said that the company had informed defendant that its hands were purchasing whisky from plaintiff, and that this was given as the reason for issuing the order prohibiting the hands from trading with plaintiff, or whether it was meant that the defendant had imputed this to plaintiff. The declaration does not aver any fact or facts which will remove this ambiguity.

The question presented for determination is whether any of the alleged slanderous words averred in the declaration are actionable *per se*. No special damage is averred, and before the plaintiff can maintain his action the words alleged to have been spoken must be actionable *per se*. *Rodgers v. Rodgers*, 11 Heisk., 757; *Smith v. Smith*, 2 Sneed, 473.

It is also a well-settled rule of practice that if the alleged defamatory words are indefinite or ambiguous, and do not of themselves show that the plaintiff was meant, the pleadings must state such extrinsic facts and circumstances as will connect the plaintiff with the al-

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leged defamatory matter. Am. & Eng. Ency. of Pl. & Pr., vol. 13, p. 40. The same authority lays down the rule that, if the words used are of doubtful significance or ambiguous, it is essential that the pleadings show in what sense they are used, and apply to them the proper meaning. But the pleader cannot introduce new matter, nor enlarge, extend, or change the natural sense or meaning of the alleged defamatory words.

Until the case of *Smith v. Smith*, 2 Sneed, 473, it was the rule in this State that the common law gave no action for mere defamatory words, unless producing special damage, and confined the action of slander to such grosser words as impute positive crime. *Williams v. Karnes*, 4 Humph., 10. In that case the rule was extended to include cases where the charge "imputes an offense, whether a crime or misdemeanor, involving moral turpitude, and for which an indictment or presentment will lie, then the words that impute it are in themselves actionable." The court quoted with approval from Chief Justice De Grey in *Onslow v. Horne*, 3 Wils., 177, as follows:

"The rule is that the words must contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor, and the charge upon the person spoken of must be precise."

In direct connection with the rule stated, the court adopted the definition of moral turpitude, as given by Mr. Webster, to be "inherent baseness or vileness of principle in the human heart; extreme depravity."

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In *Smith v. Smith*, supra, it was determined that words imputing to plaintiff the sale of intoxicating liquors to slaves on Sunday were slanderous and actionable *per se*, for the reason that such sales were made for petty gain to ignorant and dependent slaves, who were the property of their masters, which was an offense indictable and punishable under the laws of this State, as also was the sale of whisky on Sunday. The court does not say in that case that selling whisky generally involves moral turpitude, in such a sense as to make defamatory words charging a sale actionable *per se*.

It was held in *Williams v. Karnes* that a charge that plaintiff altered the earmark of defendant's hog from defendant's to plaintiff's, or procured it to be done, was not actionable *per se*, in the absence of an averment that the mismarking was done for the purpose of fraudulently appropriating the property. This holding was based upon the principle that the offense of mismarking was not at that time indictable, or, if indictable, was not subjected to corporal or infamous punishment, and therefore the imputation of the offense does not amount to verbal slander, without allegation and proof of special damages.

All sales of intoxicating liquors are not unlawful within this State. So, if it be conceded that selling intoxicating liquors involves moral turpitude within itself, there is nothing in the words imputed to defendant, either standing alone or in connection with the averments of the declaration, which shows that plaintiff was charged with a crime. It has recently been held

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by this court that many sales of intoxicants may be lawfully made within four miles of a schoolhouse where school is kept. *Kelly v. State*, 123 Tenn., 516, 132 S. W. 193.

Sales for all nonbeverage purposes, such as medicinal, scientific, culinary, and the like, are lawful. Likewise, it was necessary for the declaration to show that the words spoken of plaintiff meant that plaintiff had made unlawful sales of intoxicating liquors within twelve months from the time the words were spoken. If the plaintiff had made sales unlawfully, but more than twelve months before the defendant accused him thereof, he would be guilty of no indictable offense punishable under the law. It was necessary for the plaintiff to affirmatively show, either from the words imputed to the defendant, or by a colloquium stating the circumstances under which the words were spoken and the situation of the parties, that the sale imputed to him was unlawful. General words imputing a sale, which may be lawful or unlawful, are not actionable *per se*. The court will indulge no presumption to supplement the case stated in the declaration. The plaintiff must state a case, in actions for oral slander, which clearly shows that defendant imputed to him an indictable offense involving moral turpitude, which is punishable under the law. Every element of the offense must be embraced within the words alleged to have been spoken of and concerning the plaintiff, or it must be shown by proper averments that their clear meaning was of that effect, and that they were spoken in such a way that bystanders so

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understood them. Am. & Eng. Ency. of Pl. & Pr., vol. 13, p. 57, and authorities there cited. The rule is thus stated in 25 Cyc., pp. 439, 440:

“Where defamatory matter imputing a crime is published in terms *prima facie* actionable and unequivocally expressive of the essential ingredients of the crime alleged to be charged, no prefatory averment of extraneous facts is required. But where the imputation does not *per se* import criminality, and depends on extrinsic facts to explain it, these facts must be set forth, and connected with the defamatory words by a colloquium, so as to show that a crime was charged. If the words may be understood in a sense not criminal, and there is no colloquium to show that they were spoken in a criminal sense, they are not actionable.”

The writ of *certiorari* is allowed, and the judgment of the court of civil appeals, reversing the judgment of the circuit court and remanding the case for new trial, is reversed, the demurrer sustained, and the suit dismissed, at plaintiff's cost.

Brinkley v. State.

J. W. BRINKLEY v. STATE.

(Nashville. December Term, 1911.)

INDICTMENTS AND PRESENTMENTS. For selling liquor without license does not include, as a less offense, the offense for exercising privilege of retail liquor dealer without payment of prescribed tax, when.

Under a presentment for selling intoxicating liquors without the license required by law, and in violation of Acts 1899, ch. 161, sec. 1, under which a single sale is sufficient to constitute the offense, the defendant cannot, in the absence of evidence of any specific sale authorizing a conviction of the offense charged, be convicted of violating Acts 1909, ch. 479, sec. 16 (page 1759), making it a misdemeanor to exercise the privilege of a retail liquor dealer without first paying the taxes prescribed for the exercise thereof, though he has a United States revenue license to retail liquor, the procuring of which is made by the said act (page 1743) *prima facie* evidence that he is in the retail liquor business, because the offense denounced by said act of 1909 is not an offense less than and included in the offense denounced by said act of 1899, within the meaning of the statute (sections 7085 and 7195 of Shannon's Code), permitting, on an indictment for an offense admitting or consisting of different degrees, a conviction of a lower degree of the offense than that in form charged, or of any offense necessarily included in that charged. The fact that the punishment prescribed for the violation of the offense denounced by said act of 1909 is less than that prescribed by said act of 1899 is not determinative, and does not make the offenses denounced by said act of 1909 an offense less than and included in that denounced by said act of 1899. A single sale is sufficient to constitute the offense under said act of 1899, but not that under said act of 1909, under which a number of sales or acts constituting a business is necessary to constitute the offense, and certainly

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an offense requiring a number of sales to constitute it cannot be less in degree than an offense requiring but a single sale to constitute it.

Code cited and construed: Secs. 7085, 7195 (S.); secs. 5951, 6061 (M. & V.); secs. 5122, 5222 (T. & S. and 1858).

Acts cited and construed: Acts 1832, ch. 22; Acts 1851-52, ch. 36; Acts 1899, ch. 161, secs. 1, 2; Acts 1909, ch. 479, secs. 4, 16, pp. 1726, 1743, 1759.

Cases cited and approved: McCroskey v. State, 2 Cold., 180; Fanning v. State, 12 Lea, 651.

FROM WARREN.

Appeal from the Circuit Court of Warren County.—
EWIN L. DAVIS, Judge.

JOHN L. WILLIS, for Brinkley.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The grand jury of Warren county, at the May term of the circuit court of the year 1911, by presentment charged:

First, that J. W. Brinkley did on the 10th day of November, 1910, unlawfully sell and tippie spirituous, vinous, malt, alcoholic, and intoxicating liquors as a beverage within four miles of a school, where school was kept, against the peace and dignity of the State, and

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Second, that J. W. Brinkley did unlawfully sell and aid in selling spirituous, vinous, malt, alcoholic, and intoxicating liquors without first procuring a license for that purpose, against the peace and dignity of the State.

At the September term, 1911, defendant was put upon trial on his plea of former acquittal, and also on his plea of not guilty. Whereupon the attorney-general elected to prosecute on the second count of the presentment, and after introduction of evidence, and the charge of the court, the jury returned into court their verdict whereby they found defendant guilty under the second count in the presentment. Motion for new trial and in arrest of judgment having been made and overruled, defendant was adjudged liable to pay a fine of fifty dollars and the costs of the cause, from which judgment he has appealed to this court and assigned errors.

The following portion of the charge of the court is made the basis of one of the assignments of error:

“No specific sale having been proven, the attorney-general does not ask for a conviction under the act of 1899, which carries with it a jail sentence; but he insists that it has been proven that the defendant is guilty, under the revenue act of 1909, of exercising the privilege of retail malt liquor dealer without a State and county license, which is a misdemeanor, punishable by fine of from ten dollars to fifty dollars. You are instructed that this lesser offense is included in and covered by the second count of the indictment in this case.”

Was this error? The act of 1909 referred to in the above excerpt from the charge was chapter 479, p. 1726,

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of the Acts of that year, otherwise called the "Revenue Act." On page 1743 it provides:

"Liquor dealers are defined as every person, company, or firm selling spirituous, vinous, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale. The procuring of United States revenue license to wholesale or retail liquor dealers shall be taken as *prima facie* evidence that the parties are in the wholesale or retail liquor business, and are subject to State and county taxes, unless established by proof that they are not so engaged. Upon any clerk's receiving knowledge of such internal revenue license, he shall have a right to collect the taxes by distress warrants: Provided, that nothing in this act shall authorize or legalize the sale of liquors."

On page 1759 it provides:

"Sec. 16. Be it further enacted, that it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

The second count in the presentment, on which the attorney-general elected to try, was predicated on chapter 161 of the Acts of 1899, whereby under section 1 it is made a misdemeanor, punishable by fine of not less

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than fifty dollars nor more than \$200, and by imprisonment in the county jail or workhouse for six months, for each offense, to sell or aid in selling in any way whatever intoxicating liquors without a license required by law, and whereby, under the second section, the same punishment is provided for any person convicted of allowing, after due notice, the illegal sale of intoxicating liquors on their premises or lands, by one who has not the license required by law to make such "sales."

It is clear that the second count of the presentment was not based on the second section of the act of 1899. It is equally clear that it was based on the first section of that act. Now, under the first section of that act, a single isolated sale or act in aid thereof would be a violation of that section; but would such single isolated sale or act in aid thereof be a carrying on of the business of selling within the meaning of the revenue act of 1909? The charge in substance told the jury that a violation of the act of 1909 was the lesser offense, and that as a lesser offense it was included in and covered by the greater offense created by the first section of the act of 1899. Or to put it in a different way, the charge in substance told the jury that the business was a lesser offense than one sale, or one act in aid thereof made in violation of the first section of the act of 1899.

Upon what reason can it be said that the business of selling intoxicating liquors is an offense of less degree than one sale or one act in aid thereof? We can see none. On the contrary, if one sale, or one act in aid

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thereof, be an offense against the law, then surely a business made up of repeated sales is not a less offense, or an offense lower in degree.

The punishment for the violation of the first section of the act of 1899 is greater than that prescribed for the violation of the act of 1909; but this fact is not determinative of the question raised by the charge. That question must be determined by our statutes. Section 7085 of Shannon's Code is: "On an indictment for a public offense admitting of different degrees, the defendant may be convicted of such offense, or any degree lower than that charged in form in such indictment." Acts 1832, ch. 22; Acts 1851-52, ch. 36. Section 7195 of Shannon's Code is: "Upon an indictment for any offense consisting of different degrees the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, and the defendant may also be found guilty of any offense, the commission of which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor." So under section 7085, above quoted, the question arising on the charge is whether the offense charged in the indictment, on which the defendant was being tried, was one which admitted of different degrees; that is to say, whether the character of the offense was such an act as could be divided into degrees of guilt lower in grade than the principal offense charged in the indictment.

Certainly a number of sales, or such acts and conduct as would constitute a business of the selling, of intoxi-

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cating liquors without license, would not be lower degrees of the offense charged in the indictment; and so, under the above-quoted section 7195, upon the same reasoning, it cannot be said that the acts and conduct, which would constitute a carrying on of the business of selling intoxicating liquors in violation of the act of 1909, would either amount to an attempt to commit the offense charged in the indictment, or to an offense the commission of which is necessarily included in that charged in the indictment, within the meaning of section 7195. *McCroskey v. State*, 2 Cold., 180; *Fanning v. State*, 12 Lea, 651.

There was no proof of any specific sale, and the court so told the jury in the above excerpt from the charge. The defendant was convicted of having made a specific sale in violation of the act of 1899, when in fact there was no proof that he had made such sale. The conviction rests wholly upon the charge of the court that proof of the possession by the defendant of the United States revenue license for the sale of malt liquors is *prima facie* evidence of the violation by the defendant of the act of 1909, and that a violation of the act of 1909 is a lesser degree of offense, and is included in the charge in the indictment on which the defendant was tried.

We think the charge was clearly erroneous for the reasons above indicated, and the judgment of the circuit court is reversed, and the cause remanded.

Bonham v. Harris.

E. W. BONHAM *et al.* v. J. T. HARRIS *et al.*

(*Nashville.* December Term, 1911.)

1. CHANCERY PLEADING AND PRACTICE. Replication to affirmative allegations of the answer is not required.

The complainant in a bill in chancery need not file a replication to the answer; for the law interposes a formal replication, making an issue upon the affirmative averments of the answer. (*Post*, p. 458.)

Code cited and construed: Secs. 6132, 6138, 6244 (S.); secs. 5065, 5071, 5177 (M. & V.); secs. 4322, 4328, 4432 (T. & S. and 1858).

Cases cited and approved: *Stainback v. Junk*, 98 Tenn., 306, 317.

2. RELIGIOUS SOCIETIES. Members adhering to doctrinal standards of their church are entitled to the church property as against members joining another church under an attempted void union of the two churches.

The union attempted between the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, more briefly called the Presbyterian Church, U. S. A., was void, and in case of a division of a congregation of the Cumberland Presbyterian Church and a subsequent litigation over the church property, the faction which adhered to the doctrinal standards of the Cumberland Presbyterian Church was the true congregation, and was entitled to the property, and the faction which went over to the Presbyterian Church in the United States of America, in recognition of such attempted void union, had no longer any right to the church property. (*Post*, pp. 456, 457, 463.)

Case cited and approved: *Landrith v. Hudgins*, 121 Tenn., 556.

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3. **SAME.** Same. Members adhering to doctrinal standards of their church are not estopped by participating in government and services with congregation of the void union with another church.

The members of a congregation of the Cumberland Presbyterian Church, who, for a short time after the attempted void union of said church with the Presbyterian Church in the United States of America, continued to participate in the government and to attend the services of their congregation meeting at the church house of the Cumberland Presbyterian Church which claimed to become a part of the Presbyterian Church in the United States of America, are not estopped from claiming that they are part of the original congregation and entitled to its property, where influential members affiliating under said attempted void union stated that members had a year in which to decide, and these members refused to agree to the union before the test case deciding the invalidity of the union was determined. (*Post*, pp. 457-461, 465.)

4. **SAME:** Election of elders as a new congregation by members adhering to doctrinal standards of their church does not create a new congregation, when.

Where a part of the members of a congregation of the Cumberland Presbyterian Church insisted that it had become a part of the Presbyterian Church in the United States of America, by an attempted union between those two churches or denominations, subsequently adjudged to be ineffective, while other members of the congregation insisted that they were still a part of the Cumberland Presbyterian Church and a continuation of the old congregation, it was held that an election of elders by the anti-unionist did not create a new organization or congregation, though the elders were elected by the members, as when a new congregation is established, and without a nomination by the session, as is required in the election of elders in an established congregation, with a provision that the members may nominate a person for the eldership, regardless of the fact that the session has nominated some one else,

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and may elect the person so nominated by themselves; and especially such election did not create a new organization, where it was declared by the members, while participating in the election without such nomination by the session, that they were acting as the original congregation, and were not forming a new congregation. (*Post*, pp. 461-463.)

5. **SAME.** Void union of two churches leaves the church property with the original organizations.

Where an attempted union between two church denominations is void, because not in conformity with the constituent rules and principles required by one of these bodies to make such union effective, the church property of the one can be carried into the other denomination only by the unanimous consent of the members of the former; and until such consent has been given, the property is not transferred from one organization to the other, but remains that of the original organization, and prior to that time any member or members can signify dissent from such union and retain the property in the old organization; for the members adhering to the principles and doctrines of their church denomination are the true congregation, and are entitled to its property. (*Post*, pp. 463, 464.)

Case cited and approved: *Landrith v. Hudgins*, 121 Tenn., 556.

6. **Same.** Acquiescence in void union of two churches and the action of the majority may amount to conclusive evidence of consent to transfer; but not estoppel; rule not applicable in this case.

Where an attempted union between two church denominations was void, there may be an acquiescence of the minority members for such length of time in the action or course of conduct of the majority of a congregation as to amount to conclusive evidence of a unanimous agreement for the transfer of the property, although no formal vote was given for the transfer of such property from the one church denomination to the other, and the members so acquiescing may be conclusively presumed to consent thereto, not upon the doctrine of estoppel,

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but upon a rule of evidence, and admission inferred from such conduct. However, the facts of this case do not present grounds for such an inference. (*Post*, pp. 464, 465.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

W. C. CALDWELL, W. B. LAMB, FRANK SLEMONS, and
J. H. ZARECOR, for complainants.

JOHN M. GAUT, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed by E. W. Bonham, J. N. Hobbs, Thomas Harbinson, Joe H. Barbee, John M. Smith, John D. Robertson, B. E. White, Thomas Allen, and J. H. Shaver, as elders; Andrew McLaughlin, L. W. Johns, H. E. Sheler, L. L. Alexander, J. R. Landis, and Ed Matthews, as deacons; and W. H. Anderson, John W. Martin, Green B. Carr, and J. T. Macon, as members, of Grace Cumberland Presbyterian Church, at Nashville, Tenn., in behalf of themselves and all of the members of the congregation similarly situated, against J. T. Harris, H. B. Hill, W. T. Hardison, H. Parrish, C. S. Johnson, W. B. Baird, R. E. Bartlett, Jr., J. M. Gaut, C. S. Johnson, and John White, as "el-

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ders of a congregation calling itself the Grace Presbyterian Church, U. S. A., Morris Fox, August Gwinner, Edward Jones, W. G. Jones, N. S. O'Callahan, W. H. Shearon, and Ben S. Williams, deacons in said church and congregation, and members of said church; all of whom are sued in their own right and for the entire class of members of said church and congregation, who, like themselves, have publicly renounced their allegiance to the Cumberland Presbyterian Church, and declared themselves to be members of the Presbyterian Church in the United States of America; and W. T. Rodgers, formerly a minister of the gospel in the Cumberland Presbyterian Church, but who, as the other defendants, has publicly renounced his allegiance to said church and declared himself to be a minister of the gospel in the said Presbyterian Church in the United States of America, and is now acting as pastor of the other defendants, who have seceded from the Cumberland Presbyterian Church, residents of Davidson county, Tennessee, defendants.

This suit grows out of the controversy which was settled by this court in the case of *Landrith v. Hudgins*, 121 Tenn., 556, 120 S. W., 783.

In that case this court held that the union attempted between the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, or more briefly called the Presbyterian Church, U. S. A., was void, and that, in case of a division of a congregation of the Cumberland Presbyterian Church and a subsequent litigation over the church property, that faction

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which adhered to the doctrinal standards of the Cumberland Presbyterian Church was the true congregation, and was entitled to the property. The court also held in that case that the faction of such congregation which went over to the Presbyterian Church, U. S. A., in recognition of such void attempted union, had no longer any right to the church property.

The complainants in the present bill claim to be and represent that portion of the congregation of Grace Cumberland Presbyterian Church which remained with that church and did not go over to the Presbyterian Church, U. S. A., and the proof sustains this contention. The proof also shows that the defendants and those whom they represent recognize such void union and publicly claim to be members of the Presbyterian Church, U. S. A.

Under the foregoing facts, and the principles settled in *Landrith v. Hudgins*, the complainants are entitled to recover the church property for which they sue, being the church house and the land on which it rests, with the appurtenant property, nothing else appearing.

It is insisted, however, that the complainants are estopped on the ground that, after the alleged union was promulgated by the General Assembly of the Cumberland Presbyterian Church at Decatur, Ill., in May, 1906, and announced by the officiating minister of Grace Church in June, 1906, they acquiesced therein, and that they thereafter affiliated with those members who followed the alleged union in all church services, including contributions to the various church benevolencies and other church activities.

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Under our practice, the complainants need not file a replication to the answer; but the law interposes a formal replication, making an issue upon the affirmative averments of the answer. Shannon's Code, secs. 6132, 6138, 6244; *Stainback v. Junk Bros.*, 98 Tenn., 306, 317, 39 S. W., 530. These matters must therefore be treated as being denied by the complainants. There is no evidence to sustain the averments of the answer upon this subject, except as to E. W. Bonham, John M. Smith, John D. Robertson, and Andrew McLaughlin. Therefore, if it should be held that they were estopped, it would not prevent the other complainants from obtaining a recovery. However, the most that can be said as to Bonham, Smith, Robertson, and McLaughlin is that, while they did not approve the attempted union, they went along as usual in attending church and in contributing of their means, and from time to time attended the meetings of the official bodies of the church to which they belonged; that is, as elders or deacons. This continued up until the late fall of 1906. In addition it appears that Mr. Bonham, early in 1904 or 1905, participated in the election of a delegate to the Presbytery, who announced that he was in favor of the union, and did not dissent from the view expressed by that delegate, who stated that he was going to vote for the union, and, in effect, allowed it to be understood at that time that he favored the union; no one dissenting of the board of elders, at that time, but John M. Smith. As to John M. Smith it also appears that in the fall of 1906 his son was nominated by the session of the organization repre-

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sented by the defendants as a deacon in that organization, and elected by the congregation, and that he participated in the subsequent meeting of the session of which he was then a member in the consecration and setting apart of this son of his through the ordinance of the laying on of hands. It should further be stated that it was well known in the congregation all along that there were dissenters in their midst, and the policy pursued was to deal gently with these, to discourage debate and controversy on the subject of the union, hoping that in time they would become fully satisfied to remain. They were told that they were still Cumberland Presbyterians, and that all things would go on in the church as before; that they would know no difference; that in truth the Presbyterian Church, U. S. A., had come to the Cumberland Presbyterian Church, and not the latter to it—all of which views we have no doubt were honestly entertained by those who expressed them. In addition, an idea had gotten abroad among these dissenters, or some of them, based on an erroneous construction of a remark made by a very influential member of the congregation, Mr. Hardison, that all members would have a year in which to decide whether they would remain Cumberland Presbyterians or go with those who embraced the union. These various views had a distinct effect upon the minds of the dissenting element, the representatives of which are before us as complainants, sufficient of themselves to neutralize any inference to be drawn from apparent acquiescence. It should further be stated, in explanation of the acts referred to of

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apparent acquiescence on the part of the persons mentioned, that in July, 1906, the bill in the case of *Landrith v. Hudgins* was filed and an injunction was issued, which was understood by the Cumberland people to restrain them from claiming to be Cumberlands under the old organization of that church. It also appears that it was understood that that case was to be a test case, that would decide the validity of the union in this State, and that it would settle all controversies. This case was not finally decided until December, 1908. It is fair to presume, in the light of the evidence, that the parties who conformed to the requirements of the alleged union, pending this suit, did so only provisionally, subject to their right to reassume their original position on the termination of the case against the union. The interval that elapsed between May, or June, 1906, and July, 1906, was not sufficient to hold any of the complainants responsible for such acquiescence as would estop them from subsequently assuming their true position and claiming their rights. After the suit of *Landrith v. Hudgins* was begun, and the injunction was sued out in the manner stated, no adverse inference could be indulged against these parties by reason of such apparent acquiescence. Moreover, long before that suit was determined, all of these parties made known publicly their purpose to remain with the old organization. This was done January 13, 1907, openly, in a meeting of the congregation of the church just after the completion of the day's services, on a Sunday. Prior to that time, on about December 13th, there was a meeting of what was called

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the official board of the church, consisting of the elders and deacons, at which twenty members were present. At this time the question was asked whether that was a meeting of officers of the Cumberland Presbyterian Church, or the Presbyterian Church, U. S. A. When the minister in charge replied that it was a Presbyterian, U. S. A., meeting, this was denied by others present, resulting in a controversy, at which it appears that the division was about equal—that is, ten on each side—one side openly claiming that they adhered to the old organization, and the other that they were members of the Presbyterian Church, U. S. A. Soon after that the public meeting was held in the church, as already stated.

At that meeting proclamation was made that all who wished to continue as members of the Cumberland Presbyterian Church should repair to a certain part of the auditorium, and this was done. A minister of the Cumberland Presbyterian Church was sent for, and certain persons were elected elders.

It is insisted on behalf of the defendants that at this meeting the parties who responded to the proclamation withdrew from the old organization of Grace Cumberland Presbyterian Church and established themselves as a new organization. This is based on the fact that the new elders who were elected were not nominated by the session, but by some member present, and elected by the congregation or assemblage of persons who had answered the proclamation. While it is said the rules of the Cumberland Presbyterian Church require that, in the case of the election of an elder in an established

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congregation, nominations shall be made by the session, and that when a new congregation is established they shall be elected by the people without such nomination, the rule also permits that the people may nominate a person for the eldership, regardless of the fact that the session has nominated some one else, and may elect the person so nominated by them. It is said, however, that Mr. Zwingle, a Cumberland Presbyterian preacher, who had come at the call of the dissidents, read from the Cumberland Presbyterian standards the passage above referred to, and explained the practice to be followed when a new church is organized, and when an elder is elected in an established organization, and that he proceeded to follow the plan which was laid down as proper in the organization of a new congregation, and that Mr. Bonham arose and corrected him, stating, in effect, that this was not a new organization, but a continuance of the old, but that the minister proceeded as he had begun without regard to the interruption. There is evidence upon both sides of this question, but we do not think it material. As already stated, before Mr. Zwingle came the people had gathered into a separate body under the call of Mr. Bonham for the perpetuation of the old organization. If the minister mistakenly supposed that they intended to effect a new organization, it would not result in that manner, since their avowed purpose was, as already indicated, to continue the old organization, and the fact that they elected two elders out of their midst without the nomination of their ses-

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sion was immaterial, since, as already stated, that practice was allowed. .

As previously stated, it does not appear that any of the complainants, or any of the congregation they represented, conformed in any way to the union at any time, except Bonham, Smith, Robertson, and McLaughlin. The fact that Bonham in 1904 or 1905 voted for a delegate to the Presbytery whom he knew was in favor of the union would not deprive him of the right of reconsidering the matter in 1906. In 1904 and 1905 the matter was inchoate, and it yet remained to be seen whether the union would be lawfully effected. It was not lawfully effected, as we have held in the case of *Landrith v. Hudgins*. As to the acts of these parties, after May, 1906, we have already stated our views upon that matter, and, as we have said, even if these particular parties could be held estopped by their apparent acquiescence after May or June, 1906, the other complainants and those whom they represented would not be estopped.

In what we have said we have assumed that conforming to the church services with those who supported the attempted union, and subscribing to church funds and taking part in the various acts of the governing bodies of the church, would amount to an estoppel, nothing else appearing. As we conceive, however, the true principle is this: Where an attempted union between two churches is void, because not in conformity with the constituent rules and principles required by one of these bodies to make such union effective, the church property can be carried into another denomination only by

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unanimous consent of the members of the church. Until such unanimous consent is had, the property is not transferred from one organization to the other, and prior to that time any member or members can signify dissent and retain the property in the old organization. This is bound to be so on principle. Where property is owned by a church congregation, it is devoted to the principles and doctrines professed by that denomination. Those who adhere to those principles and doctrines are the true congregation. Those who do not are no longer a part of the congregation to which the church property belongs, no matter whether they be the majority or the minority. These are the settled rules, as shown in *Landrith v. Hudgins*. However, as stated, if there is unanimous consent, the whole congregation can do with the property as it wills. Until there is such consent the property holds its original status; that is, the property, for example, of a Cumberland Presbyterian congregation. Of course, there may be an acquiescence for such length of time in the action or course of conduct of the majority of a congregation as to amount to conclusive evidence of a unanimous agreement, although no formal vote was taken for transfer from one faith or church affiliation to another. This rests, not upon the doctrine of estoppel, since the conduct of others was not affected thereby, nor any interest of theirs prejudiced, but upon a rule of evidence—an admission inferred from conduct, so long continued and so unequivocal as to admit of no other reasonable construction. The facts of the present

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case, we think, do not present grounds for such an inference.

It is insisted, however, by defendants, that the case of *Landrith v Hudgins* should be overruled. That case was argued by some of the ablest counsel in the State on both sides of the question. Very voluminous briefs were filed, in addition to elaborate oral arguments. The court held the case under advisement for a year, and considered it in all its bearings, and, after doing this, handed down the opinion which is published in 121 Tenn., 556, 120 S. W., 783. We had before us, at the time, the decisions of the supreme courts of Georgia and Texas and of the court of appeals of Kentucky, and declined to follow them, because we did not believe that those decisions were based on sound principles, or that the true result had been reached therein. The fact that the supreme courts of several other States have since followed those decisions is immaterial. The conclusion reached by this court was believed at the time to represent the sounder view, and we see no reason to change it. We decline to overrule that case. Under that case, it must be regarded that the controversy between the contending factions in the Cumberland Presbyterian Church is settled, and it is useless to bring cases to this court with the hope of inducing the court to disregard that decision. We understood, at the time, that it was a case brought to test the question as to the validity of the union, and, in that view, gave to it extraordinary attention and care.

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We see no error in the decree of the chancellor, and it is affirmed.

CONCURRING OPINION.

MR. JUSTICE LANSDEN delivered the following concurring opinion :

I concur in the result reached by the court in this case, but I desire to state the reasons of my concurrence in the result, as well as to express my disagreement with what appears to be a statement of general principle applicable to this and like controversies in the opinion of Mr. Justice Neil.

I do not believe that *Landrith v. Hudgins* should be overruled at this time. The unfortunate controversy arising between a faction of the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America has been waged for a number of years, both in and out of the courts, and has been marked with a spirit of acrimony that is not creditable to the cause of Christianity.

Since the decision of *Landrith v. Hudgins*, the disputants have, in a large measure, conformed themselves to the results declared in that case, and no good could arise to any of the parties, or to the great cause which they represent, to reopen the controversy.

Still I believe it proper to say that, in my opinion, *Landrith v. Hudgins* was decided contrary to the great weight of authority, and is unsound upon principle. It is practically nothing more than a comparison of creeds and a substitution of the opinion of a majority of this

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court upon theological controversies for the opinion of the highest courts of the two churches, which were created by the disputants themselves for the settlement of such controversies. Differences of opinion have always existed upon theological questions, both in and out of the church, and in the very nature of things it is a matter that cannot be settled with any degree of certainty beyond a mere opinion upon questions which are inherently uncertain within themselves. It is a bold thing for a civil court to undertake to investigate and determine for itself, in opposition to the expressed opinion of trained theologians, questions of this character. More especially is this true when the two highest courts of the disputants have reached an agreement, after a discussion of the question covering a period of years, which finally resulted in a submission to the constituent bodies of each church of the question which this court now determines was wrongly decided by the churches themselves. The case of *Landrith v. Hudgins* stands alone.

It is also my opinion that the complainants Bonham and McLaughlin are estopped to maintain this bill. This is not important, so far as the result of the case is concerned, as many of the complainants have done nothing upon which an estoppel against them could be based. Unless a different rule is to be applied to this class of litigation, it would seem clear that where officers of the congregation conform to the church services after the union, and subscribe to the church funds and take part in the various acts of the governing bodies of the church,

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with full knowledge that it was claimed by their associates that the union had been effected, they would be estopped. Especially is this true where no expression of dissent was made upon their part. This clearly indicates a willingness upon their part to enter into and acquiesce in the attempted union, and having done this with full knowledge of all the facts, under well-settled principles of equity, they could not be heard later to say to the contrary. While the opinion does not expressly support the proposition herein stated, there is a clear assumption that this might be true.

The opinion, however, states the true principle to be: "Where an attempted union between two churches is void, because not in conformity with the constituent rules and principles required by one of these bodies to make such union effective, the church property can be carried into another denomination only by unanimous consent of the members of the church. Until such unanimous consent is had, the property is not transferred from one organization to the other, and prior to that time any member or members can signify dissent and retain the property in the old organization."

As a general statement of principle governing cases of this kind, I think the foregoing is correct, and would determine the legal title to the church property. However, the word *consent* should be understood in its substantive sense, and should be equivalent to acquiesce. Formal positive consent should not be required, and no length of time is necessary to establish consent. If the members of a congregation, with full knowledge of all the facts,

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acquiesce in the conduct of the governing authorities of the congregation whereby an unequivocal purpose to devote the church property to the uses of the Presbyterian Church is clearly manifested, they should be deemed to have consented. I understand the opinion to concede that there may be an acquiescence for such length of time in the action or course of conduct of the majority of a congregation as to amount to conclusive evidence of a unanimous agreement, although no formal vote was taken for transfer from one faith or church affiliation to another. This is correct, except so far as it may imply the necessity of any particular length of time of acquiescence to establish the consent. Time is not necessarily a material element of such acquiescence. If the facts are known and fully understood, and are sharply brought to the attention of the congregation, it is incumbent upon those who may desire to object to the conduct of the majority to do so. In my opinion, these principle are so familiar and elementary that citation of authority is unnecessary.

DISSENTING OPINION.

MR. JUSTICE GREEN delivered the following dissenting opinion :

Conceding that *Landrith v. Hudgins* is sound law, I concur with the result reached herein.

With the utmost deference to the majority, however, particularly to the learned judge who prepared the opinion in that case, I cannot agree that *Landrith v. Hudgins* makes a proper disposition of this unfortunate controversy, and believe the case should be overruled.

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In *Landrith v. Hudgins* this court under takes to review a decision of a high ecclesiastical tribunal of competent jurisdiction passing upon points of church faith and doctrine. The opinion undertakes a comparison of creeds, and discovers doctrinal differences, which learned theologians officially declared did not exist.

Landrith v. Hudgins commits this court to a policy that will, in my judgment, always prove embarrassing, and compel us to review and overhaul every sectarian or intersectarian dispute that may hereafter arise, if, perchance, so-called property rights are involved. This, too, although such matters have been formally and regularly determined by the judicatories organized and empowered by the disputants themselves to settle such differences.

The true rule is that the civil courts shall accept as conclusive the determination of the proper ecclesiastical authority in these controversies. It was so held formerly in Tennessee, in *Nance v. Busby*, 91 Tenn., 328, 18 S. W., 874, 15 L. R. A., 801. It was so held in *Watson v. Jones*, 13 Wall., 679, 20 L. Ed., 666, by the supreme court of the United States. It is so held by all the late decisions, except in Tennessee and Missouri, and this rule applied to this particular controversy by the courts of Georgia, Texas, Kentucky, Arkansas, Alabama, Illinois, Indiana, Mississippi, California, and perhaps others. So that *Landrith v. Hudgins* is out of line with our own decisions, with the supreme court of the United States, and with the practically unbroken current of modern authority.

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It is related in the Book of Acts that, when the Apostle Paul was sojourning and preaching in Corinth, the Jews, displeased with his teachings or methods, "with one accord made insurrection against him," and brought him to the judgment seat of the Roman deputy, Gallio, "saying, 'This fellow persuadeth men to worship God contrary to the law.'

"And when Paul was now about to open his mouth, Gallio said unto the Jews, 'If it were a matter of wrong or wicked lewdness, O ye Jews, reason would that I should bear with you.

" 'But if it be a question of *words and names* and of your law, look ye to it, for I will be no judge of such matters.'

"And he drave them from the judgment seat."

This church controversy, it seems to me, presents but a question of words and names. The union of these religious bodies does not deprive any communicant of his seat in the sanctuary. Only the name of one of the churches is changed. No one now doubts but that the salvation of souls, the great object of all church effort, can be as surely promoted through one denomination as another. No real rights are involved in this dispute, spiritual or legal. No real question is made of the sort secular courts were organized to determine.

The old Roman deputy, with the bluntness of his race, announced the correct rule. He made a precedent, from which I respectfully insist no civil court should depart.

For the reasons thus briefly indicated, I file my dissent.

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R. L. CANTRELL v. J. H. RING *et al.**

(*Nashville*. December Term, 1911.)

1. **CONSTITUTIONAL LAW.** Statute regulating bulk sales of merchandise is a valid and constitutional exercise of the police power.

The statute (Acts 1901, ch. 133), construed as an enactment of substantive law making sales of merchandise in bulk in violation of its provisions absolutely void, is a valid and constitutional exercise of the police power for the regulation of trade and the prevention of fraudulent sales by merchants to the injury of their creditors. (*Post*, pp. 477, 478.)

Acts cited and construed: Acts 1901, ch. 133.

Cases cited and approved: *Neas v. Borches*, 109 Tenn., 398; *State v. Mill Co.*, 123 Tenn., 404; *Lemieux v. Young*, 211 U. S., 489; *Jaques & Tinsley Co. v. Carstarphen Co.*, 131 Ga., 7-17; *Squire v. Tellier*, 185 Mass., 18; *McDaniels v. Shoe Co.*, 30 Wash., 549.

2. **SALES OF MERCHANDISE IN BULK.** Without compliance with statute regulating same are fraudulent in law and absolutely void.

The statute (Acts 1901, ch. 133), providing that the sale in bulk of a stock of merchandise, or any portion thereof, otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, shall be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall, at least five days before the sale, make a full and detailed inventory showing the quantity, and so far as possible, with the exercise of reasonable dili-

*Constitutionality of bulk sale legislation, see notes in 2 L. R. A. (N. S.), 331; 20 L. R. A. (N. S.), 160.

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gence, the cost price, to the seller, of each article to be included in the sale, and unless such purchaser shall, at least five days before the sale, in good faith, make full and explicit inquiry of the seller as to the names of his creditors and their addresses, and notifies them personally, or by registered mail, of the proposed sale, the cost price, and the price to be paid therefor, is construed and held to be a substantive law declaring such sales without compliance with its said provisions to be fraudulent in law and absolutely and conclusively void, though there be no fraud in fact, and not simply a statute prescribing a rebuttable presumptive rule of evidence. (*Post*, pp. 474-482.)

Acts cited and construed: Acts 1901, ch. 133.

Case cited and approved: *Jaques & Tinsley Co. v. Carstarphen Co.*, 131 Ga., 15, 16.

3. SAME. Same. Seller's concealment of the larger part of his creditors and indebtedness avoids sale under statute regulating such sales; case in judgment.

Where a retail merchant, the owner of a retail stock of goods, contracts to sell or to exchange his entire stock at a given price, without inventory or notice to his creditors, to whom he was then indebted for a large part thereof, but after the contract was made, and on demand of the purchasers, gave them a list of his creditors and indebtedness, but concealed the larger part thereof, and the inventory then taken amounted to about one-third of the represented value of the goods, whereupon the purchasers refused to complete the purchase, the sale so attempted to be made was fraudulent in law, void, and non-enforceable, because of the noncompliance with the statute (Acts 1901, ch. 133), regulating the sales of merchandise in bulk, as stated in the preceding headnote, without regard to the question of fraud in the misrepresentation of the value of the goods. (*Post*, pp. 480-482.)

Acts cited and construed: Acts 1901, ch. 133.

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4. **CONTRACTS.** In violation of law, or that are immoral or against public policy, are not enforceable.

An action will not lie to enforce a contract made in violation of a statute or of the common law, or which is immoral in its character, or contrary to public policy. (*Post*, p. 482.)

Cases cited and approved: *Parks v. McKamy*, 3 Head, 297, 298; *Stephenson v. Ewing*, 87 Tenn., 46; *Haworth v. Montgomery*, 91 Tenn., 16; *Insurance Co. v. Kennedy*, 96 Tenn., 714; *Harton v. Lyons*, 97 Tenn., 193; *Watterson v. Nashville*, 106 Tenn., 410.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

R. L. CANTRELL and B. M. WEBB, for complainant.

J. B. DANIEL and PENDLETON & DE WITT, for defendants.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

Complainant, R. L. Cantrell, brought the bill in this case, in the chancery court of Davidson county, against the defendants, J. H. Ring and W. L. Acuff, to recover damages for the breach of a written contract made with them on August 9, 1910, wherein he agreed to sell, and they agreed to purchase, a "stock of goods, merchandise, and fixtures, and lease on property at corner of Summer and Monroe streets, in the city of Nashville, Tenn.,

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all things there belonging to him, for the sum of \$6,000," to be paid for by the transfer to complainant of a soap factory, situated in Nashville, together with the stock on hand, formulas, and fixtures, at the price of \$2,450, and "the sum of \$3,550 in cash at once," conditioned "on said Ring and Acuff being able to raise the money aforesaid."

Complainant owned and was conducting a retail grocery store in the city of Nashville, and the property which he contracted to sell the defendants was the stock of goods, merchandise, and fixtures used in this business, and the lease upon the house in which the business was conducted. The contract was for a sale of all this property for a given price, to be paid as above stated, and was made in bulk, without inventory and notice to the creditors of complainant, who was then indebted for goods purchased for the business in the sum of about \$2,300.

The defense made and relied upon by the defendants in their answer is that the contract for the sale of the property was fraudulent and void in law, because made in violation of chapter 133, Acts of 1901, prohibiting sales in bulk of stocks of merchandise, or any portion thereof, otherwise than in the regular course of trade, without first complying with certain things therein prescribed, and fraudulent and void in fact, because of alleged false and fraudulent representation made to them by complainant of the quality and value of goods and merchandise in stock, and other property which they agreed to purchase.

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The defendants also assert that the real contract price which they agreed to pay for the property of complainant was \$5,000, to be paid by a transfer of the soap factory and stock at \$1,450, and \$3,550 in money, conditioned upon their being able to raise the same, and that the value of the property owned by the parties, respectively, was incorrectly stated in the written instrument, at the request of complainant, to aid him in disposing of the soap factory.

The case proceeded to proof, and much testimony was taken on both sides upon the issues made in the pleadings.

The chancellor upon the entire record held for the complainant, and gave him a decree for the contract price of his property, as claimed by him, \$6,000, less something over \$1,000, arising from the sale of the property which complainant contracted to sell the defendants, by a receiver appointed in the cause, and by order of the court made before the hearing, by consent of the complainant, paid on one of his debts, conceded by him to be secured by a lien on the property.

The defendants assign this decree of the chancellor as error, insisting that both of the defenses presented by their answer are fully made out, and should have been sustained and the bill dismissed.

We do not consider it necessary, in the view we have taken of the case, to go into the question of fraud in fact. We think the first defense—that is, the failure of the parties to comply with the provisions of chapter 133, Acts of 1901, commonly known as the “Bulk Sales Act”

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—made the contract of sale fraudulent in law and void, and that no action can therefore be maintained for a breach or noncompliance with its terms.

The statute referred to is entitled "An act to provide the terms upon which sales in bulk of stocks of merchandise, or any portion thereof, otherwise than in the ordinary course of trade, may be made." It provides that sales of stocks of merchandise in bulk, or any portion of the same, otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, shall be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall, at least five days before the sale, make a full, detailed inventory, showing the quantity, and so far as possible, with the exercise of reasonable diligence, the cost price to the seller, of each article to be included in the sale, and unless such purchaser shall, at least five days before the sale, in good faith, make full and explicit inquiry of the seller as to the name and place of residence, or place of business, of each and all of the creditors of the seller, and cause them to be notified personally, or by registered mail, of the proposed sale, cost price of the merchandise to be sold, and price to be paid therefor, the seller to truthfully furnish said information."

This act has been sustained as a valid and constitutional police regulation of trade, to prevent fraudulent sales by merchants, to the injury of their creditors. *Neas v. Borches*, 109 Tenn., 398, 71 S. W., 50, 97 Am. St. Rep., 851. The principles upon which statutes of this

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character are sustained are fully stated in *State v. Mill Co.*, 123 Tenn., 404, 131 S. W., 867.

Statutes with similar provisions have been enacted by a majority of the other States, and their validity has been sustained in most instances by their courts of last resort and by the federal courts. Some of the leading cases, in which most of the others are cited and commented on, are *Jaques & Tinsley Co. v. Carstarphen Co.*, 131 Ga., 7-17, 62 S. E., 82; *Squire & Co. v. Tellier*, 185 Mass., 18, 69 N. E., 312, 102 Am. St. Rep., 322; *McDaniels v. Connelly Shoe Co.*, 30 Wash., 549, 71 Pac., 37, 60 L. R. A., 947, 94 Am. St. Rep., 889; *Lemieux v. Young*, 211 U. S., 489, 29 Sup. Ct., 174, 53 L. Ed., 295.

The courts of the several States differ some in the construction and the effect of these statutes. In some States it is held that they merely prescribe a rule of evidence; others hold that the sales made without compliance with the statutes are voidable only as against creditors; while still others hold that the statutes are an enactment of substantive law, declaring sales made in violation of their provisions absolutely void; and this is the view this court has taken of the statute of this State.

The supreme court of Georgia, in *Jaques & Tinsley Co. v. Carstarphen Co.*, supra, 131 Ga., 15, 16, 62 S. E., 88, speaking through Mr. Chief Justice Fish, says:

“While the act was passed with the object of preventing persons in debt, who own stocks of goods, wares, and merchandise, from selling the same in bulk for the pur-

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pose of defrauding their creditors, its subject-matter is not fraud in such sales, but is the regulation of them. It prescribed certain duties which must be performed by the buyer, and certain correlative duties which must be performed by the seller. This is regulation, pure and simple. It then, in order to enforce the performance of these duties, declares, in substance, that, unless these duties are complied with, 'such sale or transfer shall, as to any and all creditors of the vendor, be conclusively presumed to be fraudulent.' The meaning of this declaration is that the sale shall, as to such creditors, be fraudulent in law, whatever it may be in fact. This is a declaration of substantive law, and not the enactment of a conclusive rule of evidence for the ascertainment of fraud in such sales. In other words, the sale, as to creditors of the sellers, shall be void, irrespective of the question whether it was in fact made for the purpose of defrauding them, because the requirements of the statute enacted for their protection have not been complied with. Granting the authority of the legislature to regulate sales of this character, it follows that it can, when prescribing regulations for such sales, declare that, unless they are made in conformity to the statutory requirements, they shall be void as to the creditors of the seller, and it matters not whether the declaration as to the invalidity of sales not made in conformity to the statute is direct or indirect, if the purpose to declare such sales void is apparent. The purpose of the act is not to provide an efficient means for uncovering fraud already committed, by providing a conclusive rule of

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evidence by which the fact of its existence may be established; but it is to prevent the commission of fraud, by providing that, in the class of sales with which it deals, certain specified requirements must be complied with, or the sale will be held to be fraudulent in law. It lays its requirements across the threshold of the transaction, and in effect declares that no contract of sale, valid as to the creditors of the seller, can be entered into unless these requirements are observed."

This court has so construed the statute of this State in a number of unreported cases, and after a re-examination of the question, we adhere to that construction. We think it was the intention of the general assembly to prohibit all sales by merchants and dealers, having creditors that may be defrauded, of their stock of goods and merchandise in bulk, otherwise than as provided by the statute, and to declare sales made without compliance with those provisions absolutely void. The statute would be wholly inoperative to effect the purposes for which it was intended if construed otherwise, and would be productive of much vexatious litigation.

We think our statute means the same as the Georgia act, although the word "conclusively" is not used in the clause declaring sales made without first complying with it shall be presumed fraudulent, and we concur in the reasoning of the Georgia court.

The sale which the complainant attempted to make to the defendants is conceded to have been in bulk, and there is no pretense that the statute at the time was complied with. The defendants were first informed of

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the statute a day or two after the contract was made, and notified that the creditors of complainant would hold them, or the goods purchased by them, for the indebtedness of complainant. They then consulted their lawyer and arranged a meeting with complainant, when they demanded that the statute be complied with, informing him they would not further proceed with the purchase unless it was done. Complainant strenuously insisted that it was not necessary to do so, but finally consented that the defendants might make an inventory of the merchandise, and gave them what purported to be a list of his creditors and the indebtedness due them, amounting to about \$800, but concealed from them the existence of a debt of \$1,500, incurred by him in the purchase of the property he was selling, and which he, after this suit was brought, admitted was unpaid and a lien upon the property, and consented that the proceeds of the sale be applied towards its payment. The defendants immediately proceeded to take an inventory of the merchandise, and found that the value of it was but little in excess of \$1,000, instead of from \$3,000 to \$3,500, as they testify the complainant represented to them to be its value. They proceeded no further in the matter, did not notify any of the creditors of the sale, but promptly informed complainant that they would not complete the purchase, and did not do so. The cash payment was never made, and defendants retained the soap factory.

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There was, therefore, no compliance with the provisions of the statute. The complainant failed, upon request, to give the defendants a correct statement of his indebtedness, as it was his duty under the statute to do, and concealed the greater part of it, conceded, as above stated, to be a lien upon the property. The sale attempted to be made was therefore clearly within the prohibition of the statute.

This being so, complainant's bill cannot be maintained. It is well-settled law that an action will not lie to enforce a contract made in violation of a statute, or of the common law, or which is immoral in its character, or contrary to public policy. *Stevenson v. Ewing*, 87 Tenn., 46, 9 S. W., 230; *Haworth v. Montgomery*, 91 Tenn., 16, 18 S. W., 399; *Insurance Co. v. Kennedy*, 96 Tenn., 714, 36 S. W., 709; *Watterson v. Nashville*, 106 Tenn., 410, 61 S. W., 782; *Harton v. Lyons*, 97 Tenn., 193, 36 S. W., 851; *Parks v. McKamy*, 3 Head, 297, 298.

The result is that the decree of the chancellor must be reversed, and complainant's bill dismissed, with costs; and it will be so decreed.

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W. G. EVANS *v.* P. C. STEELE, *Clerk of County Court.*

(*Nashville*. December Term, 1911.)

1 BILLS AND NOTES. Possession is *prima facie* evidence of ownership of bank bills.

The possession of bank bills, issued by the Bank of Tennessee, whose charter provided that they should be receivable by the State in the payment of taxes and dues to the State, makes a *prima facie* case of ownership in the holder. (*Post*, pp. 486-491 and especially 488, 489.)

Acts cited and construed: Acts 1837-38, ch. 107, sec. 12; Acts 1885, ch. 83; Acts 1901, ch. 89. See Acts 1883, ch. 104, repealed by Acts 1901, ch. 88.

Cases cited and approved on this headnote, and on other points historically stated in the opinion, as follows: *Furman v. Nichol*, 3 Cold., 433; *State, ex rel., v. Sneed*, 9 Bax., 472; *Keith v. Clarke*, 4 Lea, 718; *Clark v. Keith*, 8 Lea, 704; *Marr v. State*, 10 Lea, 470; *Noteholders v. Funding Board*, 16 Lea, 46; *Furman v. Nichol*, 8 Wall., 44; *State, ex rel., v. Sneed*, 96 U. S., 451; *Keith v. Clark*, 97 U. S., 454.

2. STATUTES OF LIMITATIONS. Do not run against bank notes issued to circulate as money as a special obligation against the State.

The notes of the Bank of Tennessee were issued to circulate as money, and under its charter were a special obligation of the State, receivable by it in the payment of taxes and other dues owing to it; and, therefore, there is no statute of limitation applicable to them, or that will run against them. (*Post*, pp. 492, 493.)

Acts cited and construed: Acts 1837-38, ch. 107, sec. 12; Acts 1885, ch. 83.

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3. **LACHES.** Chancery will refuse relief on stale demands after loss of evidence so that decree cannot be pronounced with confidence.

Relief is generally refused by courts of equity, because of the lapse of time, in cases where the loss of evidence, death of witnesses or parties, and failure of memory resulting in the obscuration of facts to the prejudice of the defendant, render uncertain the ascertainment of truth, and make it impossible for the court to pronounce a decree with confidence, though defendant does not show absolutely that his defense has been actually lost or prejudiced; for it is sufficient if it can be seen that the defendant has been deprived of an advantage which he might have had if the complainant's claim had been seasonably presented. (*Post*, pp. 494, 495.)

Cases cited and approved: *Bolton v. Dickens*, 4 Lea, 577; *Mackall v. Casilear*, 137 U. S., 556.

4. **SAME.** Same. Case in judgment, where relief on notes of the Bank of Tennessee, tendered in payment of taxes, was refused for laches of more than forty years.

The Bank of Tennessee, under the 12th section of its charter (Acts 1837-38, ch. 107), providing that its notes should be receivable at the treasury of the State and by all tax collectors and other public officers, in all payments for taxes and dues to the State, issued regular notes and notes denominated as "Torbett" or "post" notes. After the close of the war between the States, a general creditors' bill was filed, under which a receiver was appointed, and the assets of said bank were distributed among its creditors, including a large number of the holders of said Torbett or "post" notes, and thereafter Acts 1885, ch. 83, was passed, authorizing the funding of said notes by exchanging therefor certificates issued by a funding board, which act remained in force until 1901 (Acts 1901, ch. 89). The complainant, in payment of an inheritance tax, tendered to the proper county court clerk a "post" note of said bank for five hundred dollars, and a small amount of the regular notes of said bank; and, upon the clerk's refusal to

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accept them, he paid the amount due in legal tender money, and filed his bill to recover it back. In view of the fact that said notes had been receivable by the State for more than forty years; that complainant's delay was wholly unexplained; and that, through loss of evidence, the State was unable to establish a defense, it was *held* that complainant's demand was barred by laches. (*Post*, pp. 486-496, and especially 495, 496.)

Acts cited and construed: Acts 1837-38, ch. 107, sec. 12; Acts 1885, ch. 83; Acts 1901, ch. 89.

Cases cited and approved: *Hammonds v. Hopkins*, 3 Yerg., 525; *Lafferty v. Turley*, 3 Sneed, 157; *Parkes v. Clift*, 9 Lea, 524; *Pope v. Harrison*, 16 Lea, 82; *Parker v. Hotel Co.*, 96 Tenn., 252; *Hammond v. Hopkins*, 143 U. S., 224; *Abraham v. Ordway*, 158 U. S., 416; *Willard v. Wood*, 164 U. S., 510; *Chase v. Chase*, 20 R. I., 202.

FROM BEDFORD.

Appeal from the Chancery Court of Bedford County.
—W. S. BEARDEN, Chancellor.

W. B. BATES and COLEMAN & FRIERSON, for complainant.

ATTORNEY-GENERAL CATES and B. D. KINGREE, for defendant.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

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The complainant, Evans, is the owner, by purchase, of an undivided interest in the estate of Joseph H. Evans, deceased, and as such became liable to the State for \$516.74 inheritance tax. He tendered to the defendant, as clerk of the county court, \$510.50, by offering to pay that amount in bills of the Bank of Tennessee, consisting of one bill for \$500, one bill for five dollars, five bills for one dollar each, and one fifty-cent bill or shinplaster, and the remainder in lawful money of the United States. The clerk refused to accept them, whereupon the complainant paid the amount due in legal tender moneys of the United States, and brought this bill to recover it back.

No history of the alleged bills of the Bank of Tennessee is given in the record, other than is disclosed by the insignia and inscriptions upon the bills themselves. The complainant rests his case alone upon the fact of possession of the bills, which, under the authorities hereafter noticed, makes a *prima facie* case of ownership. The bill for \$500 purports to be one of the "Torbett" or "new" issue of the Bank of Tennessee, and has generally been designated as a "post" note. The smaller denominations purport to be notes of branch banks, and are the regular issue.

The twelfth section of Acts of 1837-38, ch. 107, incorporating the Bank of Tennessee, provides "that the bills or notes of said corporation originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury of the State, and by all tax collectors and other public officers,

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in all payments for taxes and other moneys due the States." The Bank of Tennessee was capitalized at \$5,000,000, and was organized and opened for business soon after the passage of the acts incorporating it, *supra*, and continued in business, with its principal office at Nashville, Tenn., until February, 1862. About the 15th of February, 1862, on account of the exigencies of the civil war then in progress, the bank with its assets was removed from Nashville to Columbia, Tenn., and from thence to Memphis, Tenn., and from thence to Chattanooga, where it remained until the summer of 1863, and from Chattanooga it was removed to Atlanta, Ga., and from Atlanta, Ga., to Griffin, Ga., and from Griffin, Ga., to Greensboro, Ga., and from thence to Augusta, Ga., and from thence to different places in the State of North Carolina, and from North Carolina back to Augusta, Ga., where its assets were seized by the Union forces and returned to Nashville.

The bank authorized and used its regular issue of notes in the usual and ordinary denominations, and in addition it had plates prepared to issue what it denominated "post" notes. These notes were in denominations of \$500 and \$1,000, and were payable in one, two, and three years after date. Some time in the year 1861, and subsequent to May 6th, the bank had used up the regular impressions from which were made the notes of usual and ordinary issue, and because of the war could not obtain more. It had on hand numbers of impressions of the "post" note form, in denominations of \$500 and \$1,000 each, and many of these "post" note impressions

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were used for ordinary issue by erasing the words "Post Notes" therefrom. After the war closed, a general creditors' bill was filed against the Bank of Tennessee in the chancery court for Davidson county, a receiver was appointed for its assets, and the assets were distributed among its creditors. It, of course, did not pay its debts in full; but a large number of its notes, among them the "Torbett" issue, were filed in the case and participated in a *pro rata* distribution of the assets of the bank.

Litigation arose between the holders of these notes and the State; it being claimed by the State that many of them were invalid, because issued and used in aid of the rebellion, and many others were forged or fraudulently issued. The general result of these suits with respect to the issue subsequent to the Ordinance of Secession, May 6, 1861, was that such notes were not necessarily void because issued at a time when the State was in insurrection against the government of the United States; but, if they were issued in the ordinary course of business of the bank, they were legal obligations against the State under the twelfth section of the charter of the bank, and were receivable in payment of taxes which might be due the State to the same extent as the notes issued prior to May 6, 1861; that all notes of the Bank of Tennessee which were in fact issued in aid of the "rebellion" against the government of the United States were absolutely void. The burden was upon the holder to show that the notes were genuine, and when this burden was satisfied by sufficient proof,

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possession of the note was *prima facie* evidence of ownership; and the burden then shifted to the State to show that the notes were issued in aid of the "rebellion." This might be shown, either by proof that the identical bills were issued in aid of the "rebellion," or that the class of notes to which they belonged were issued and circulated in aid of the "rebellion." For a history of the litigation, see *Furman v. Nichol*, 3 Cold., 433; *Furman v. Nichol*, 8 Wall., 44, 19 L. Ed., 370; *State, ex rel., v. Sneed*, 9 Baxt., 472; *State, ex rel., v. Sneed*, 96 U. S., 69, 24 L. Ed., 610; *Keith v. Clark*, 97 U. S., 454, 24 L. Ed., 1071; *Keith v. Clarke*, 4 Lea, 718; *Clark v. Keith*, 8 Lea, 704; *Marr v. State*, 10 Lea, 470; *Noteholders v. Funding Board*, 16 Lea, 46, 57 Am. Rep., 211.

After the determination of this litigation in favor of noteholders, the legislature enacted chapter 83, Acts of 1885, by which it authorized the funding of "post" notes of the denominations of \$500 and \$1,000, and the small notes of less denominations than five dollars but not less than one dollar. This was accomplished by creating a funding board and directing it to prepare certificates for all "legitimate outstanding 'post' notes, including the smaller notes, but of denominations not less than one dollar," and exchange these certificates in convenient denominations for the bank notes referred to. It was provided that, when such notes were presented to the funding board for exchange, it should have the notes examined by competent experts for the purpose of determining the genuineness of the notes. If they were found to be genuine, the board was directed

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to exchange certificates therefor, and receive the bank notes, and cancel and preserve them for such examination as the legislature might thereafter direct. It was further provided that all notes presented to the funding board in exchange of the certificates, which upon examination by them should be found to be counterfeit, should be excluded and marked counterfeit, and returned to the owner, or party presenting the same, after the description of the note had been entered in a book kept for that purpose. The certificates to be issued in exchange for the bank notes were receivable at any time before or after due in payment of all final judgments then outstanding and subsisting against defaulting and delinquent revenue collectors or their securities, and decrees in favor of the State, and in payment of all back taxes and other dues to the State which became payable before the year 1884, and also in payment of all taxes and other dues to the State, when such certificates or warrants should be due.

Many thousands of dollars of the "Torbett" issue were presented to the funding board to be exchanged for the certificates provided for in the act of the legislature, *supra*. In due course, litigation arose between the funding board and certain noteholders with respect to the fundability of certain notes. *Noteholders v. Funding Board*, *supra*. The opportunity to fund the bank notes was afforded holders thereof until 1901, when the funding board acts were repealed.

It appears that all of the books of the Bank of Tennessee, including its note register, are lost and could not be

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produced upon the trial of this case. Its officers, directors, bookkeepers, and clerks are all dead. Witnesses not connected with the bank, who may have had some knowledge with respect to the issue of the notes in question, are presumably dead. The only witness for the complainant upon the genuineness of the notes was an employee of the funding board, and he expressed the opinion that the notes in issue bear the genuine signature of the president and cashier of the Bank of Tennessee. In his direct examination, he would appear to have gone further in his testimony, and to have stated that the note was issued by the bank in the ordinary course of business and entered upon its note register as provided by its charter; but, upon cross-examination, he makes it clear that all that he knows, or intends to say, is that in his opinion the note bears the genuine signature of the officers of the bank. He also states that he did not find upon the register of the bank, which he had in his possession while with the funding board, any description of this particular bill No. 223. This witness also states that he has no knowledge of where the bill No. 223 came from, and that it may have been in litigation between the complainant and the funding board a number of years ago. The funding board kept a record of all notes that were funded, but the witness does not know whether any record was kept of notes received for taxes. There is no proof in this case to indicate whether the notes in question have ever been received in payment of taxes or funded.

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The notes of the Bank of Tennessee were issued to circulate as money, and for that reason there is no statute of limitation applicable to them which would bar the complainant's action. However, they were not a general obligation of the State to pay the holder their value in gold or silver or other legal tender money of the United States. The State's liability upon the notes of its bank was fixed and defined by section 12 of the bank's charter, which limited such liability to the receipt by the State of all such notes in payment of taxes and other moneys due it. The State did never agree to levy upon and collect taxes from its citizens for the payment of the bank's notes, nor did it in any wise obligate itself to take moneys from its treasury to redeem them. The bank was never able to issue notes legally after its assets were captured by the Union forces in 1864, and perhaps after 1862. It is a part of the history of this State that the notes of this bank have not circulated as money since the war. Therefore they amount to nothing more than a special obligation of the State to receive them in payment of taxes, and for other moneys due it from the holder of the notes. It is assumed by the funding act, *supra*, that many of these notes were both forged and fraudulently issued, and in adopting the funding scheme the legislature provided a method for determining the genuineness of all notes presented to the funding board. The conditions surrounding the bank after its flight from Tennessee would make possible the issue of many notes not genuine after that time, if, indeed, it would not make impossible the issue

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of any notes for which the State should be held liable. Certainly the bank could not be engaged in business, nor could it issue its notes in due course, while moving from place to place, and from one State to another, in the wake of the Confederate army.

There is a mere suggestion in the evidence that these particular notes have been in controversy between the State and their holders. While this fact is merely suggested by a question and an answer, after the lapse of so long a time before any claim is made under the notes, the suggestion itself is entitled to much weight. Especially is this true when taken in connection with the established facts that many notes were presented in the chancery court for *pro rata* payment in the general creditors' suit by which the bank was wound up and its assets distributed among its creditors, and the further fact that there was much litigation between the funding board and holders of notes, in which many thousands of dollars were involved, and which resulted in a general agitation and discussion at the time of the fundability of notes of a certain class, coupled with a total absence of all proof that the notes in controversy were not filed in the general creditors' suit, have not been presented to the funding board and rejected, and have not been received in payment of taxes. We do not say that there was any obligation upon the holders of notes of this class to present them to the funding board and receive in exchange therefor the certificates provided by the funding act; but the fact that noteholders generally, who held genuine notes, were presenting them to the funding board and receiving certifi-

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cates, together with the fact that holders of notes which were fraudulent or forged were likewise presenting notes to the funding board which were rejected by that body, makes the unexplained delay of presentation of these notes at least suspicious.

Delay merely is not sufficient to repel complainant in a court of equity. The true doctrine concerning laches is believed to be that, in order for it to operate as a bar to complainant's suit, it may have resulted in prejudicial delay. Relief is generally refused by courts of equity, because of the lapse of time, only in such cases where the loss of evidence, death of witnesses or parties, and failure of memory resulting in the obscuration of facts to the prejudice of the defendant, render uncertain the ascertainment of truth, and make it impossible for the court to pronounce a decree with confidence. *Bolton v. Dickens*, 4 Lea, 577. However, it is not essential that the defendants show absolutely that a defense has been lost or a right obscured as a result of the delay. It is sufficient that it appear to the court that the complainant's demand is uncertain, or that the defendant probably had a good defense to the suit. Where entire justice cannot be done by reason of the gross negligence or deliberate delay of the complainant to assert his claim, equity will not aid a party whose application is "destitute of conscience, good faith, and reasonable diligence." *Mackall v. Casilear*, 137 U. S., 556, 11 Sup. Ct., 178, 34 L. Ed., 776. The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. No hard and fast rule for its application can be formulated. But,

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when the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief. It is not required that the defendant should establish by proof an affirmative injury. It is sufficient if by the laches and delay of complainant it has become doubtful whether the defendant can command the evidence necessary to a fair presentation of the case. Or, if it can be seen that the defendant has been deprived of an advantage he might have had if the complainant's claim had been seasonably presented, a court of equity will not interfere to grant relief.

The delay in this case is wholly unexplained. The notes are demand notes. They were receivable for taxes and all debts due the State each year for more than forty years. No reason exists in law why complainant should not have presented them sooner, if genuine, and no reason in fact is suggested in the evidence. The holder of these notes must have known that the State claimed at least two defenses to this particular class of notes, and that it had interposed them against many notes in litigation between it and their holders many years ago, when the witnesses were alive and the facts could be ascertained. It is now beyond the power of the State to establish these defenses. The loss of this evidence has resulted solely from the complainant's delay. It would now be inequitable and unconscionable to enforce the complainant's demand, when it can be clearly seen that the State may have a sufficient defense thereto, but which it has lost in the obscurity of time. The delay in presenting this claim has been willful and

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deliberate. The complainant cannot be permitted to reap its advantages, nor the defendant to suffer loss therefrom. *Chase v. Chase*, 20 R. I., 202; 37 Atl., 804; *Abraham v. Ordway*, 158 U. S., 416, 15 Sup. Ct., 894, 39 L. Ed., 1036; *Willard v. Wood*, 164 U. S., 510, 17 Sup. Ct., 176, 41 L. Ed., 531; *Parker v. Bethel Hotel Co.*, 96 Tenn., 252, 34 S. W., 209, 31 L. R. A., 706; *Hammonds v. Hopkins*, 3 Yerg., 525; *Pope v. Harrison*, 16 Lea, 82; *Lafferty v. Turley*, 3 Sneed, 157; *Parkes v. Clift*, 9 Lea, 524; *Hammond v. Hopkins*, 143 U. S., 224, 12 Sup. Ct. 418, 36 L. Ed., 134; 16 Cyc., pp. 152, 160, 163-165.

The decree of the chancellor is reversed, and the bill is dismissed, at complainant's costs

De Garmo v. Prater.

WILLIAM I. DE GARMO *v.* HART PRATER *et al.*

(Nashville. December Term, 1911.)

1. **EJECTMENT.** Maintainable against actual occupant, though mere unknown servant of adverse claimant, prevents bar of statutes of limitations in favor of such adverse claimant made a party defendant by amendment.

Under the statute (Shannon's Code, sec. 4972), authorizing ejectment against the actual occupant, if any, and if no such occupant, then against any person claiming an interest therein, or exercising acts of ownership, an action of ejectment may be maintained against one in actual possession as the mere servant, agent, or employee of a third person, where such suit was instituted by a claimant having no knowledge of the actual relationship; and such suit stops the operation of the statutes of limitations, so that complainant, upon obtaining knowledge of the relationship, may make the third person a party defendant to the suit, and such new defendant cannot rely upon the seven year statute of limitation as a bar, where the statute had not formed a bar when the suit was originally instituted. (*Post*, pp. 501-523.)

Code cited and construed: Sec. 4972 (S.); sec. 3955 (M. & V.); sec. 3231 (T. & S. and 1858).

Cases cited and approved: Colcord v. Hall, 3 Head, 625; Tindal v. Wesley, 167 U. S., 204; Chatard v. O'Donovan, 80 Ind., 28; Doe v. Stradling, 2 Starkie (Eng.), 187; Shaver v. McGraw, 12 Wend. (N. Y.), 558; Lucas v. Johnson, 8 Barb. (N. Y.), 244; Hennessey v. Paulsen, 147 N. Y., 255; Hawkins v. Reichert, 28 Cal., 534; Polack v. Mansfield, 44 Cal., 36.

Cases cited, reviewed, and distinguished, or disapproved: Chiniquy v. Catholic Bishop of Chicago, 41 Ill., 148; Danlhee 125 Tenn.—32

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v. Hyatt, 151 N. Y., 493; Lattie-Morrison v. Holladay, 27 Or., 175; Hawkins v. Reichert, 28 Cal., 534; Polack v. Mansfield, 44 Cal., 36; Shaw v. Hill, 83 Mich., 322; Hendricks v. Rasson, 49 Mich., 83; Mead v. Owen, 80 Vt., 273, 278; Davis v. Williams, 130 Ala., 530; Haywood v. Miller, 3 Hill (N. Y.), 90; Kerrains v. People, 60 N. Y., 226; Bowman v. Bradley, 15 Pa., 351; Hughes v. Overseers, 5 M. & G., 54; King v. Stock, 2 Taunt., 289.

2. **SAME. Same. Complainant will not be required, at his peril, to know whether actual occupant is a tenant or mere servant.**

Where the relation of master and servant merely is apparent and unquestioned, and the master is subject to suit, there is no practical inconvenience in the administration of the rule that the claimant cannot maintain ejectment against such servant or employee; but where the solution of the question as to whether the person in occupation of the land is in fact a tenant of a third person not in possession or occupancy, or merely his servant, agent, or employee, depends upon a disputed state of facts, there would always be great inconvenience in applying, in ejectment cases, the rule that would, in such cases, prevent the maintenance of the action against such occupant, and such rule will not be adopted and applied in this State, notwithstanding the decisions of other States. (*Post*, pp. 517-520, 522, 523.)

3. **SAME. Same. Same. Claimant may maintain ejectment against occupant ostensibly controlling the land, regardless of his relation to others.**

It has always been understood in this State that the owner, or the person claiming to be the owner, might maintain ejectment against the occupant on the land, and ostensibly controlling it, no matter who he might be, or in what relation he stood to any other person; and this is regarded as the only safe rule. (*Post*, p. 520.)

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4. **SAME.** Occupant ostensibly controlling land may be sued; occupancy by possession.

The occupant is the person on the land and ostensibly controlling it. There may be a possession without actual bodily occupancy, as where one has built a house upon land and has locked the doors or has inclosed a field and has maintained his inclosures. This may be considered a form of occupancy, and, at all events, it is a possession, and it has been held in this State that suit may be brought against the party maintaining such possession or form of occupancy. (*Post*, p. 520.)

Code cited and construed: Sec. 4972 (S.); sec. 3955 (M. & V.); sec. 3231 (T. & S. and 1858).

5. **DEEDS OF CONVEYANCE.** Deed appearing to be written on back of State's grant as shown by their juxtaposition on the registration book, and thus identifying land conveyed.

Where, following the registration of the State's grant in the county register's office, there appears a registered writing purporting to be a deed, referring to the maker thereof as "the grantee in the within grant," and conveying to the grantee (named) "the within named tract of land containing five thousand acres, and described as therein mentioned," it is clear, from the connection of the two papers, that the deed was written upon the back of the grant, and referred to the land therein described as the land conveyed; and this conclusion is reached upon the foregoing matter, although the State's original grant was not before the court so that the court could see actually written upon its back the deed made by such grantee. (*Post*, pp. 523-531.)

6. **SAME.** Certificate of copies of State's grant and of grantee's indorsed deed that is sufficient to make them admissible in evidence.

Under the statute (Shannon's Code, secs. 567, 5573, and 5576), making certified copies of public records (including books of the registers) admissible in evidence, etc., a certificate of a county register is sufficient to render the copies of a grant and deed

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admissible in evidence where the certificate follows what purports to be a copy of the State's grant of land and a deed from the grantee, appearing on the register's book immediately after the grant, and held to be written on the back of the grant, as shown in the preceding headnote, which certificate recites that the foregoing grant and certificates are correct copies of a grant and certificate as the same appear of record in his office in a designated book and page. (*Post*, pp. 523-531.)

Code cited and construed: Secs. 567, 5573, 5576 (S.); secs. 529, 4541, 4544 (M. & V.); secs. 454, 3791 (T. & S. and 1858).

FROM SEQUATCHIE.

Appeal from the Chancery Court of Sequatchie County.—T. M. McCONNELL, Chancellor.

HILL & CAMP, for complainant.

L. N. SPEARS, G. B. MURRAY, and F. H. MERCER, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The complainant filed his ejectment bill, claiming title and right to possession of 2,500 acres of land described therein. The defendant Rocky River Coal & Coke Company claims title and possession of 600 acres of the land described in the bill.

Complainant bases his right upon grant No. 3,375, issued by the State of Tennessee on July 29, 1834, to one Henderson Pope, from whom he deraigns title through a series of intermediate conveyances and descent cast.

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The defendant Rocky River Coal & Coke Company claims under a grant issued to Abner Fletcher, No. 4,177, dated September 26, 1837.

There is an interlap of about 600 acres between the two grants, and this is the land in controversy.

1. It is insisted that, regardless of whether the complainant has established title, he cannot recover, because his suit was not brought against the Rocky River Coal & Coke Company until seven years had elapsed from the time the said company entered into adverse possession of the land; and the fact is that the Rocky River Coal & Coke Company was not made a defendant until after the lapse of seven years. But complainant brought his suit within six years against defendant Hart Prater. It is claimed, however, in behalf of defendant Rocky River Coal & Coke Company that the institution of the suit, at that time, was ineffectual to stop the running of the statute of limitations, because Hart Prater was a mere servant or employee of the said company, and not a tenant under it.

The fact is that D. L. Hasten, through whom the Rocky River Coal & Coke Company claims title, placed Hart Prater on the land to hold for him under a contract that Prater was to receive, in payment for such service, the sum of seven dollars per month, and, in addition, he was allowed to cultivate the land, and take the proceeds of such tillage. After Prater had remained upon the land for several years under this contract, Hasten sold the land to J. M. Overton, trustee, and he continued Prater on the land at eight dollars a month and

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the use of the land. J. M. Overton, trustee, sold the land to the Rocky River Coal & Coke Company, and it continued Prater on the same terms. Prater remained on the land, under this contract, cultivating it, for about six years. He built a dwelling house and barn on the land, and also fenced in a lot around the house and barn. The materials for the house, barn, and fence were furnished by D. L. Hasten. He entered upon the land in this way somewhere between April 1 and July 1, 1901, and was on the land when the original bill was filed, February 2, 1907. The persons made defendant to the original bill, besides Hart Prater, were D. L. Hasten, J. D. Raht, J. M. Goodbar, and J. M. Overton.

On the 4th of March, 1907, the defendants filed a petition for removal of the cause to the federal court. It appears to have been removed to that court, and then to have been remanded to the chancery court some short time prior to March 9, 1909, on which latter date defendant Hart Prater filed his answer. In this answer he admitted that at the time of the filing of complainant's bill, and for some time prior thereto, he had been "in the possession, use, and enjoyment of said land, and the rents and profits thereof, holding and claiming the same as the tenant of the Rocky River Coal & Coke Company; . . . that he had not entered on the land, save only as such tenant, and he was holding as such tenant for the said Rocky River Coal & Coke Company under the title held and possessed by said company." This answer averred that the lands were granted lands, and that the Rocky River Coal & Coke Company, and those

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under whom it claimed, had been in adverse possession under an assurance of title purporting to convey an estate in fee simple for more than seven years before complainant's bill was filed. He thereupon set up in defense said statute of limitations.

On May 14, 1909, the complainant filed an amended bill, in which he brought the Rocky River Coal & Coke Company before the court as a defendant, on the strength of the statement in the answer of Hart Prater that he was holding as tenant of that company. D. L. Hasten, J. D. Raht, J. M. Goodbar, and J. M. Overton, who were made defendants to the amended bill, answered, disclaiming any interest in the property. Hart Prater answered, saying that since his answer was filed to the original bill he had ceased to be a tenant of the Rocky River Coal & Coke Company, and had moved away from the land. The Rocky River Coal & Coke Company filed its answer, denying the title of complainant, and pleading the statute of limitations of seven years.

It thus appears that at the time the original bill was filed Hart Prater had been in occupation of the land for about six years. During the time the case was in the federal court, and before Hart Prater's answer was filed, seven years had elapsed from the time that Hart Prater first entered upon the land, and the Rocky River Coal & Coke Company was made defendant later.

As it appeared to the public, Hart Prater was in possession of the land, living in a house within an inclosure thereon; and the land was in a remote and

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sparsely settled portion of the country. Complainant, not knowing the relation which Prater sustained to the Rocky River Coal & Coke Company, brought suit against him as an occupant of the land, and now claims that, having brought this suit within seven years of the time that Hart Prater entered upon the land, the statute of limitations was arrested. The defendant insists that Hart Prater was merely a servant, placed upon the land by his master to live there, to keep the fences up around the inclosure, and to keep trespassers off, for which he was to receive the compensation per month already stated, and be permitted to take the crops from so much of the land as he might till. Hart Prater himself admitted that he occupied the relation of tenant, and so testified Hasten and several other witnesses of the defendant—indeed, practically all of the witnesses of the defendant. One of the witnesses, who was the general counsel for the Rocky River Coal & Coke Company, testified that he had seen, and had had in his possession, the written lease; but it had been lost, and he could not now produce it. The defendant introduced two of the witnesses a second time, who testified that Hart Prater was a servant, and not a tenant; but they admitted that they had not known the terms of the contract under which he went upon the land. The defendants insist that, no matter what the witnesses may have said as to the relation of landlord and tenant, still under the facts proven as to the service which Hart Prater was to perform, and the compensation he was to receive therefor, he was in law a mere servant, and not a tenant.

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It is insisted by defendant, as matter of law, that the occupant must hold for himself, or under some other as tenant; that a servant or employee merely cannot be sued as occupant. Many authorities are cited to sustain this position. It is stated in 15 Cyc., p. 85, that according to the weight of authority persons in possession of land merely as servants or employees of the party claiming title adversely are not occupants or tenants in possession of the land, within the meaning of the ejectment law, and that an action in ejectment cannot be maintained against them—citing *Polack v. Mansfield*, 44 Cal., 36, 13 Am. Rep., 151; *Hawkins v. Reichert*, 28 Cal., 534; *Chiniquy v. Catholic Bishop*, 41 Ill., 148. But in a note it is said that the rule is subject to the limitation that such a party may be treated as an occupant and sued as such where the employer, for any reason, is not amenable to an action.

In Warvelle on Ejectment, sec. 108, it is said:

“While the subject is not altogether free from doubt, the better opinion would yet seem to be that, where a person is in the actual occupation of the land only as an incident of his employment, he is not to be regarded in the same light as a tenant, and his possession is more like that of a servant. And where the occupation of land by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the possession is always that of the master. *Chatard v. O'Donovan*, 80 Ind., 28, 41 Am. Rep., 782. This raises some interesting questions in an action brought for the recovery of the land. It is a rule, both

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of the common law and of the statute, that if the premises, for the recovery of which the action is brought, are actually occupied by any person, such occupant shall be named as defendant in the suit. The rule is broad enough to embrace every kind of occupancy, and if literally construed would include persons who are in the nominal possession of land merely as servants or employees of the adverse claimant. And this was the construction given to it in the earlier decisions. *Doc v. Stradling*, 2 Starkie (Eng.), 187. And see *Shaver v. McGraw*, 12 Wend. (N. Y.), 558.

“Modern authorities reverse this holding, and announce that such persons are not to be regarded as occupants within the meaning of the law, and, notwithstanding such occupancy, the rule at present would seem to be that an action of ejectment cannot be maintained against them. *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill., 148; *Danihee v. Hyatt*, 151 N. Y., 493, 45 N. E., 939; *Lattie-Morrison v. Holladay*, 27 Or., 175, [39 Pac., 1100]; *Polack v. Mansfield*, 44 Cal., 36. At all events, mere employees of the defendant, who have simply been permitted to reside upon the lands in controversy at the time suit is brought, and who claim no rights or interest therein, are not necessary parties defendant. *Shaw v. Hill*, 83 Mich., 322, [47 N. W., 247], 21 Am. St. Rep., 607; *Danihee v. Hyatt*, supra.

“The general rule, that ejectment must be brought against the party really interested in the possession, and not against the mere agents or employees by whom his occupancy is maintained, only applies, however, to cases

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where the principal or employer may be sued. If the employer is not amenable to an action, the rule fails, and the agent, servant, or employee becomes the proper party defendant. Thus, ejectment may not be brought against the United States, but will lie against an agent or officer of the United States in possession. See *Polack v. Mansfield*, supra."

In *Hanson v. Armstrong*, 22 Ill., 442, it was held that it was not necessary to make any other party than the occupant a defendant. In *Hendricks v. Rasson*, 49 Mich., 83, 13 N. W., 367, it appeared that a man let his son have money toward buying a farm and lived with him on it, working all over it, receiving a certain proportion of the crops, and occupying certain rooms in his house, exclusively, claiming a right to remain on the premises. It was held that these facts did not in themselves make it necessary to implead him as a joint defendant, with his son, in an action in ejectment; further, that a defendant in ejectment cannot, for the purpose of defeating the action, rely on the non-joinder as defendant of any person occupying the premises with him under a claim of right that is merely subordinate to and wholly inseparable from his own possession. In *Shaver v. McGraw*, supra, it was held that ejectment for premises occupied and possessed by a servant, although he claimed no beneficial interest, must be brought against such servant. In *Lucas v. Johnson*, 8 Barb. (N. Y.), 244, it was held that if there be an actual occupant he must be named as defendant in ejectment; that, if the premises are actually occupied, it is immaterial who

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claims to be owner. In New York, under Code Civ. Proc., sec. 1502, providing that, if the land is occupied, the occupant must be made defendant, it was held that it was not necessary that all the occupants should be made defendants. *Hennessey v. Paulsen*, 147 N. Y., 255, 41 N. E., 516. In *Tindal v. Wesley*, 167 U. S., 204, 17 Sup. Ct., 770, 42 L. Ed., 137, it was held that an ejectment suit might be brought against the occupant of the land, although he was only an employee or agent of the person claiming to be owner. However, that was a case in which the owner could not be sued, because it was a sovereign State. Therefore the case last referred to would fall within the exception laid down in *Polack v. Mansfield*, supra.

We deem it proper to refer to the principal cases cited in Cyc. and by Warvelle, in order that the facts on which the decisions in those cases rest may be compared with the facts in the present case.

In *Hawkins v. Reichert* the evidence was conflicting. Some evidence tended to prove that defendant moved a small wooden building on the premises, which was the beginning of the ouster, and was in possession and claiming the premises as his own at the commencement of the suit; that one Klatt, who lived in the house that was moved upon the premises, was but the servant of the defendant; that he was working on the premises and under the direction of the defendant, and moved the house under his orders. On the other hand, the testimony tended to prove that Klatt was a tenant of the defendant, and the defendant testified positively that Klatt

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was his tenant, and other testimony tended to the same conclusion. The court said: "It will be readily seen that a mere servant or employee may in one sense have the occupation of the premises, over which he has no control, and in which he claims no right; but his occupation is the occupation of his employer, within the meaning of that term as employed when treating of the action of ejectment. Conceding that Klatt was personally present and living in the house, it was still a question of fact for the court to determine whether he was there in his own behalf or only and solely as the employee of the defendant." Preceding this the court said: "The doctrine is very clear that, as the action lies only to recover the possession of the premises wrongfully withheld from the plaintiff, it must be brought against the person who, at the commencement of the action, withholds the possession; that is to say, it must be brought against the occupant. [Citing authorities.] The tenant—and not his landlord, unless he is also an occupant—should be made the defendant. In this case the evidence is conflicting as to who was the occupant of the small portion of land in controversy at the commencement of the action." In *Polack v. Mansfield* the decision in *Hawkins v. Reichert* was approved; but, it appearing that the land was held by an officer of the United States government for military purposes, as the government could not be sued in the State court, it was held that the officer might be made a defendant in ejectment as the person in actual occupation. In *Chiniquy v. Catholic Bishop* it was stipulated on the trial of the issues that

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there was at St. Anne an incorporated religious society by the name of the Christian Catholic Church at St. Anne, incorporated under the general laws of Illinois; that this society was a Protestant religious association, not in communion with the Roman Catholic Church or having any connection therewith; that defendant Charles Chiniquy, for five years next preceding the action, had been a minister of this religious society, and had regularly officiated in the building which stood upon the premises in controversy; that for some five years he had kept a stable on a portion of the premises sought to be recovered, and kept his horses and stock there, but that prior to the commencement of the action he had removed his stable and stock; that the other defendants were the trustees of the society, with the exception of one Gustave Demars, and that the said trustees had control of the premises and employed the said Chiniquy as the minister of the church, and Gustave Demars as a teacher, and that he had taught a school in the building from a time prior to the commencement of the suit and until the suit was commenced; that such possession and control by the trustees was adverse to the plaintiff, and that the possession and control of Chiniquy and Demars (if any) was under the trustees, and was also adverse to the plaintiff. The trial judge instructed the jury that if Chiniquy and Demars occupied the premises only for the purposes of a minister to conduct public worship, and as a school teacher, and that they so occupied the premises in the employ of a society or corporation known as the Christian Catholic Church of St.

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Anne, and under their direction, and had no other or further possession or control of the premises, and that the trustees of the corporation or society had the actual possession, then the plaintiff could not recover against Chiniquy and Demars. In disposing of this matter the court said: "This instruction excludes the idea that Charles Chiniquy and Gustave Demars were in possession of the premises as tenants of the trustees, but is drawn on the hypothesis that they were merely their servants or employees, performing their daily or weekly tasks upon the premises, and not the occupants in the sense of the ejectment law. It puts a case which, if believed by the jury, would no more render Chiniquy and Demars liable to an action of ejectment than would be the cashier or teller of a bank, if a suit was brought against a banking corporation to recover possession of the banking house. It surely cannot be said that a clergyman, who preaches on Sunday or any other day of the week in a church edifice, under the direction and employment of a religious corporation, is liable to an action of ejectment, and to be mulcted in costs, at the suit of a person claiming the title against the corporation. Nor is the hypothesis on which this instruction is drawn excluded by the stipulation in the cause, for that does not admit possession by Chiniquy and Demars. It is only on the ground that they are in possession, and that such possession is admitted to be adverse to the plaintiff, leaving the question of possession debatable. The facts do not show it existed in them, but in the trustees by whom they were employed. As well might the claim-

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ant of a farm bring his action against the men employed to cultivate the farm by the occupant in adverse possession. The action would not lie against such employees, they not being occupants in the sense of the ejectment law."

In *Chatard v. O'Donovan* it appeared that plaintiff was a bishop of the Catholic Church, and that he had placed O'Donovan in possession of the parsonage of the congregation named, to occupy so long as he served the congregation as priest, but that his term of service depended entirely upon the will of the bishop, and that it was his duty to surrender the property whenever he should be removed from his care of the congregation by the bishop; the bishop, under the rules of the church, being the sole arbiter of the question as to when a removal should be made; that for good cause to him appearing the bishop removed O'Donovan and demanded possession of the parsonage and church, which O'Donovan refused to yield. Thereupon suit was brought for the possession. The court held that the plaintiff was entitled to recover, on the ground that the relation between the parties was that of master and servant, and that the possession was the possession of the bishop; that the occupancy of the servant was subject to the will of the master, and when the relation of servant and master terminated it became the duty of the servant to at once vacate the premises.

There is nothing in *Shaw v. Hill* applicable to the subject except the following: There was "some evidence tending to show that one Curran was in the actual occu-

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pancy of the premises at the time this suit was brought, and it is claimed by the defendant that he should have been made a defendant. It was shown, however, that the occupancy of Curran was for but a short time, and while he was working for defendant; that he made no claim to any rights in the land, either as tenant or otherwise. It seems that he wanted to move in a house on the premises, and the defendant permitted him to do so. Under the circumstances, it was not necessary to make him a party."

In *Lattie-Morrison v. Holladay* (*Morrison v. Holladay*) one of the questions was whether a service on one Malin was sufficient to stop the running of the statute of limitations in a suit brought to recover an interest in the property known as the "Seaside House." The court, after stating that under the Oregon Code an action for recovery of real property must be commenced against the party "in the actual possession of the premises at the time," said: "The facts about which there is no dispute are that Malin, who resided in Portland, was temporarily in possession of the property in controversy at the time the action was commenced as the mere servant or employee of Holladay, having been sent down a few days before to prepare the Seaside House for the reception of guests, and to act as manager thereof during the season, and that he claimed no interest in, or right to, the possession of the premises in any other capacity than as a mere hired servant or employee, subject to the orders and control of his employer. Under

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such circumstances it seems to us manifest that his possession was that of his employer, and that he was not a proper party to the action to recover possession of the premises. The person against whom the statute requires the action to be brought must be more than a mere agent or servant, who claims no title to the land or right to the possession or control thereof; but it must be some person in possession, exercising acts of ownership and claiming title or right to the possession in himself. A person may be in possession of land either in person or by some agent or servant, acting under his direction or control, and, in the latter case, the possession of the agent or servant will be the possession of the employer, and he is the party against whom the action must be commenced, and not the agent or servant."

In *Danihee v. Hyatt* the plaintiff brought his action of ejectment against John Hyatt for a small triangular piece of land lying between the premises occupied by the plaintiff and the premises in which the defendant's wife had a leasehold interest. Soon after defendant's wife acquired title to the lease she entered into the actual possession of the premises thus conveyed, together with the piece of land in dispute, and thereafter actually occupied this disputed land, claiming that it formed a part of the land to which she had acquired title under the leasehold deed. She graded the land in dispute, making a driveway partly over it and partly over her adjoining land, which extended from the highway in front to a barn standing in the rear. When plaintiff commenced his action, he knew that defendant's wife

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was the actual occupant, and that she claimed to be the sole and exclusive owner. Before the suit was brought the plaintiff constructed a fence around the southern line of the land in dispute, and this was removed by the defendant. Afterwards he placed a load of wood upon the disputed land, and this the defendant removed. The defendant also assisted his wife in placing and fastening a wagon thereon. The defendant, in removing the fence, and removing and placing the wagon upon the land, did so at the request, under the immediate direction of, and solely for his wife, and to aid her in maintaining her possession of the premises over which the controversy had arisen. On these facts the court said: "The defendant not being in actual occupation of the premises, but having performed the acts mentioned merely as a servant or employee of his wife, without claiming title or right of possession, ejectment will not lie against him."

Numerous cases are cited by defendant exhibiting different states of facts wherein persons were held to be servants rather than tenants. Of these we need only cite, as typical of all, *Mead v. Owen*, 80 Vt., 273, 278, 67 Atl., 722, 13 Ann. Cas., 231; *Davis v. Williams*, 130 Ala., 530, 30 South., 488, 54 L. R. A., 749, 89 Am. St. Rep., 55; *Haywood v. Miller*, 3 Hill (N. Y.), 90; *Kerrains v. People*, 60 N. Y., 226, 19 Am. Rep., 158; *Bowman v. Bradley*, 151 Pa., 351, 24 Atl., 1062, 17 L. R. A., 213; *Hughes v. Overseers of Chapham*, 5 M. & G., 54; *King v. Stock*, 2 Taunt., 289. We deem it unnecessary to review all of these cases. The first of these cited suffi-

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ciently reviews all of the others. The principle to be extracted is, in general, that where the occupation of the house is a mere incident to the employment of a servant he holds the house as servant, and not as tenant, and his right to its occupation ends with his right of service. Some of the illustrations given are where a man is employed to work on a farm, and is allowed to occupy a house on the premises while so working; or where a hostler is allowed a room over a stable; or a porter the use of a house at his master's park gate, while engaged in his master's service; or where domestic servants are allowed to occupy rooms in the house of a master during their service to him. These instances present cases of clear and easy solution. However, the authorities show that the solution of each case depends upon its particular facts, and it is often difficult to determine, in relation to farms and outlying lands especially, whether the occupant is a tenant or a mere servant. We have in this State one case which comes nearer to the particular state of facts we have in hand than any other that we have encountered. This is *Colcord v. Hall*, 3 Head, 625. In that case it appeared that the parties had entered into the following written contract, viz.: "*Things that I want done.*—Fence at common put up; to keep all the fences up and sure to keep out the hogs and other stock. I wish you to do the best you can with the potatoes and oats, and also the clover, and to collect the pasturage, and to receive the money for me, and for you to use what money so collected, and for sale for potatoes, oats, etc., to be applied to the payment of taxes

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and building of fence, etc., and for the rendering of the above services to have the house rent, use of garden, firewood, and pasturage for what cows you keep for family use. Mr. A. J. Hall to hold possession until the 25th of December, 1859, and said Hall to have entire control of the premises as agent for Ariand E. Colcord." In the fall of the year Mrs. Colcord forcibly expelled Hall from the premises, to regain which he instituted an action, and obtained judgment in his favor in the trial court. The court said: "It is now insisted that, under this writing, Hall was merely the agent, and not the lessee, of A. E. Colcord, and that his agency might be put to an end at any time, and the possession and use of the land lawfully resumed by her, and that the circuit judge erred in instructing the jury otherwise. We do not think so. He was not a mere agent, but, in addition, took an interest in the premises, as the lessee of A. E. Colcord, and was entitled to the possession until December 25, 1859. This is too plain for argument. We must take the entire instrument together, and give effect to all its parts. His agency may very well stand with his interest as lessee."

We have stated the rule prevailing in other States, and have given numerous illustrations from cases decided in those States. Where the relation of master and servant merely is apparent and unquestioned, and the master is subject to suit, we see no practical inconvenience in its administration. Where, however, the solution of this question as to whether the person in occupation of the land is in fact a tenant, or merely a serv-

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ant, depends upon a disputed state of facts, there will always be great inconvenience in applying the rule in ejectment cases—enough to make it extremely perplexing for one about to sue in ejectment for the possession of his land. In a question so intimately affecting land titles in this State we must adopt a course of decision which will best safeguard that important interest, without being too much swayed by the decisions of other States.

The question in the phase now represented is one of first impression in this State, and we must adopt a rule which is in harmony with the policy of our law.

Our Code (Shannon, sec. 4972) provides, as to the actions of ejectment: "The action is brought against the actual occupant, if any, and, if no such occupant, then against any person claiming an interest therein or exercising acts of ownership at the commencement of the suit." We have no decision construing the word "occupant" as it occurs in this section. It must be construed in the light of the history of ejectment cases as they have arisen in this State. The defense most generally interposed in this class of cases has been the statute of limitations. Until within comparatively a recent period there were many very large bodies of unoccupied land in this State, and there are still such bodies in our mountainous regions. The custom has been for persons desiring to claim land either to squat upon it themselves, or to place a tenant thereon to hold for them. It has been held that when the owner saw a possession fixed upon his land, or when such possession was so open, public,

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and notorious that he ought to have seen it, or could have seen it by exercising proper care over his lands, he should bring suit within seven years after such possession taken, if maintained continuously; otherwise, he would forfeit his right of action, and the party in possession, if holding for himself under color of title, would obtain title to the land by the lapse of time, and, in case he did not hold under color of title, he would have a perfect defensive right to the extent of his boundaries as shown by his inclosures, or by some paper defining his boundaries. The same result would follow in favor of a person for whom the occupant might be holding. It has never been understood in this State that the owner, seeing an occupant upon his land, was bound to investigate at his peril whether the latter stood in the relation of tenant to some other person, or employee or servant of that other person, or in his own right. It has all along been understood that he would have the right to proceed against the occupant without naming any one else whomsoever. Such privilege has proven very important to owners asserting title to lands adversely claimed. Those who are in possession of the lands of another, seeking to hold them by lapse of time, are generally speaking, not very just, and will not scruple to deceive or mislead the owner, or throw him off his guard. It is entirely possible that such owner, interrogating the person in possession, might be informed that he was tenant of some other person for such land, and allow the suit to proceed until the seven years' limitation had expired, and then make it known, or permit the owner to discover,

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that he, such occupant, was merely the servant, agent, or employee of that other person, to hold possession for him. We do not think that it is incumbent upon owners, asserting title to land, to take the risk of such inquiries. It is quite within the bounds of probability that the person in possession might claim to be the tenant of one person, or the servant of one person, when he occupied that relation to another, and other frauds might be perpetrated. It has always been understood in this State that the owner, or person claiming to be owner, might proceed against the occupant, no matter whom he might be, or in what relation he stood to any other person. This is regarded as the only safe rule. We do not mean, of course, that where the person is occupying, and he has servants under him, or his own family living with him, that these must be made parties. The occupant would be the person on the land and ostensibly controlling it. Of course, there may be a possession without actual bodily occupancy, as where one has built a house upon land and has locked the doors, or has inclosed a field and has maintained his inclosures. This may be considered a form of occupancy: at all events, it is a possession, and it has been held in this State that suit may be brought against the party maintaining such possession or form of occupancy.

There is no danger that the rights of persons whom such occupants represent, either as tenants or servants, may be injured by the construction we have given. It has been held in this State that, although judgment has been rendered against the person in possession, it will

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not bind the person under whom the possessor claims, unless that person causes himself to be made an actual party to the suit, which he may do under our Code. Of course, the judgment will be binding against the *tenant* or occupant, and he may be ejected from the land. This, however, will not prevent the person under whom he claims himself bringing suit against the party prevailing against the occupant. However, he will, of course, be under the great disadvantage of being required to prove a complete title, and show his right to immediate possession. It is also true that many perils must be encountered by the plaintiff in ejectment where the land title is complicated. Hence, it is true that by having his tenant, or the person claiming under him, ejected, and having himself thus forced to become a plaintiff, he has suffered a distinct disadvantage. To alleviate this, the rule has been laid down in this State that, if the tenant or person claiming under another fail to notify him of a suit brought, the latter may cause the writ of possession to be stayed, and the judgment set aside, and be allowed to defend, even after the close of the term of court. These principles will be found discussed in *Hillman v. Chester*, 12 Heisk., 34, and cases cited; *Conn. v. Whiteside*, 6 Humph., 47; *Boles v. Smith*, 5 Sneed, 105.

Of course, cases may be imagined where servants in possession, having no personal interest in the property, would neglect to notify the master of a suit brought against them, and judgments by default might be taken and writ of possession awarded without knowledge of

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the master. This would be a great hardship, but it would be met by the rule in the cases just referred to. We may also imagine cases where the possession of the servants would be of such casual character as that they would not be regarded as occupants. There is no danger, however, of such a mistake, where a person is placed upon land, as in the case now before us, for the express purpose of holding under and for another, and the person so placing him is trying to obtain title to that land by adverse possession, and has chosen to put the occupant of the land in the relation of technical employee rather than of technical tenant. In such a case there is a distinction without a difference. If he is a tenant holding possession of the land for his landlord, in order that his landlord may obtain title by adverse possession, he accomplishes no more by seven years' possession than a person who holds like possession under his master, and is compensated by wages for the purpose of maintaining possession; the service performed by him being merely that of maintaining possession by residing upon the land and keeping the inclosures up. We have no doubt that in such a case the person occupying the land is a true occupant in every view of the case. Indeed, it generally appears in this class of cases that the person placed on wild lands with a view to establishing and maintaining an adverse possession for a claimant requires to be paid for his services either in money or in a part of the land, and it has never before been insisted in this State, so far as we have any knowledge, that such person was a mere servant, instead of tenant, and hence not subject

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to be sued in ejectment. A decision favorable to such contention could not have other than a disastrous effect upon land titles in this State. It is right enough that when one man shall be placed upon the land, or in the house, of another, and a controversy arises between them in respect of that matter, the question shall be investigated and determined as to whether the occupant is, under the terms of the contract, a tenant, or a mere servant to be summarily expelled on termination of the service if he fail to move; but it is quite a different matter whether the rights of a third party in the land shall depend upon the settlement of such a question, the facts on which it depends being wholly foreign to him, and unknown to him, the penalty of a mistake in this collateral question, wholly aside from his own title and right, being the forfeiture of that title and right. We cannot yield our assent to a doctrine carrying such consequences.

2. There is a regular chain of conveyances from the grantee of the State down to the complainant. It is insisted, however, by the defendant that one link is broken. The facts connected with this matter are as follows: There appears upon the registration books of Marion county a copy of the grant which the State issued to Henderson Pope, and, following that, a writing purporting to be a deed referring to the maker of the deed as "the grantee in the within grant," and purporting to convey to David Schoolfield the land described in that grant. It is said that this deed, even if properly introduced in evidence, conveys nothing, because it de-

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scribes nothing. We are of the opinion, however, that it is very clear from these papers, as they appear upon the record of the register's office, that the deed was written upon the back of the grant, and referred to the land therein described as the land conveyed.

It is next insisted that the deed was not properly introduced in evidence, because there is no certificate of the register that the paper relied upon and introduced in evidence as a copy was in fact a copy thereof. The objection is based upon the fact that the register, in making certificate, referred to "the foregoing grant." We are of the opinion, however, that under the liberal construction which the paper should be given it is perfectly clear that the register intended to certify that all which preceded his certificate was a true copy of what appeared upon his record. Whether he intended to use the word "grant" in the sense of a grant or patent by the State, or in its more enlarged sense of any kind of a deed from one person to another, is immaterial. If in the former sense, he understood by grant the whole paper which he had copied, both face and back; or, if he understood the word "grant" in its larger sense, the result would be the same.

We are of the opinion, therefore, that the deed was properly admitted, that the complainant has shown a complete chain of title, that the chancellor's decree should be reversed, and a decree should be entered here for the complainant.

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ON PETITION TO REHEAR.

The complaint made in the petition is based on the second point contained in the original opinion of the court. The instrument there referred to appears as follows upon the transcript of the record of the lower court:

“No. 3,575. Henderson Pope.

“State of Tennessee No. 3,375.

“To all whom these presents shall come, greeting: Know ye that by virtue of entry No. 1,201 made in the office of the entry taker of Marion county and entered on the 18th of February, 1834, pursuant to the provisions of an act of the general assembly of said State passed on the 9th day of January, 1830, there is granted by the said State of Tennessee unto Henderson Pope a certain tract or parcel of land containing five thousand acres by survey bearing date of the 14th day of July, 1834, lying in said county and in the county of Bledsoe adjoining a five thousand acre survey made in the name of Aaron Schoolfield known as No. 1 and on both sides of Big Brush creek a branch of Sequatchie river beginning at a black oak and hickory and white oak pointers said Schoolfield's northeast corner of said survey near the left bank of the north fork of said Brush creek crossing and running thence with said Schoolfield line east crossing said Long fork one thousand poles to a stake then north nine hundred and sixty poles to a stake then east crossing said Brush creek one thousand poles to a white oak near the east bank of said creek at the foot of a hill in Bledsoe

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county, thence south crossing Savages turnpike and said Brush creek again nine hundred and sixty poles to the beginning exclusive of one thousand acres contained in the lands with the hereditaments and appurtenances.

“To have and to hold the said tract or parcel of land with its appurtenances to the said Henderson Pope and his heirs forever.

“In witness whereof William Carroll Governor of the State of Tennessee hath hereunto set his hand and caused the great seal of the State to be affixed at Nashville on the twenty-ninth day of February, in the year of our Lord one thousand eight hundred and thirty-four and fifty-eighth year of our independendence. Wm. Carroll.

“By the Governor:

“Sam G. Smith, Secretary.

“Henderson Pope is entitled to the within described land. R. Nelson, Register of the Mountain Dist. Recorded in my office Book E, page 310. R. Nelson, Register of the Mountain District.

“Know all men by these presents that I Henderson Pope the grantee within named for and in consideration of the sum of five hundred dollars to me in hand paid the receipt of which is hereby acknowledged have granted bargained sold assigned and set over and by these presents do grant, bargain, sell, assign and set over unto David Schoolfield of the county and State aforesaid his heirs and assigns the within named tract of land containing five thousand acres and described as therein mentioned to have and to hold the said tract of

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land hereby mentioned unto the said David Schoolfield his heirs and assigns forever. In witness whereof the said Henderson Pope hath hereunto set his hand and seal, this 11th day of September, 1834, signed, sealed and delivered in the presence of us. Henderson Pope. [Seal.]
"State of Tennessee, Bledsoe County.

"Personally appeared before me Sam'l S. Story clerk for the circuit court for said county Henderson Pope with whom I am personally acquainted and who acknowledged that he signed sealed and executed the above transfer for the purposes therein contained witness my hand at office the 12th day of September, A. D. 1834.

"Registered 20th Feb. 1836.

"Sam'l Story, Clerk.

"State of Tennessee, Marion County.

"I, C. A. Quarles, register, do hereby certify that the above and foregoing grant and certificates is a true and correct copy of a grant and certificates as the same appears of record in my office in Book C, page 374. Witness my hand and seal this Feb. 8, 1910. C. A. Quarles.

"[Seal.]

For Marion County, Tenn."

The exceptions made to the introduction of the foregoing evidence are thus stated in the record:

"On the trial of this cause, when complainant offered in evidence the paper writing purporting to be a transfer, assignment, deed, or conveyance from Henderson Pope to David Schoolfield, dated the 11th day of September, 1834, and being part of a paper writing made Exhibit 5 to the deposition of A. D. R. Lanier, the de-

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fendant excepted to the introduction and consideration by the court as evidence the said paper writing: First, because it did not describe any lands thereby conveyed, or attempted to be conveyed; second, because it was not certified; third, because it was not properly certified as required by law in such cases; fourth, because there is nothing in the record to show that said paper writing was ever appended or affixed to, or indorsed upon, any part of the paper writing preceding it, purporting to be a grant for five thousand acres of land to Henderson Pope, being grant No. 3,375."

We think the original opinion fully and properly disposes of all of these objections. We shall only add to what is there said on the general subject that the register has the right to give certified copies, and such copies are evidence. Shannon's Code, section 567, subsec. 7; also sections 5573 and 5576. Section 5573 reads: "Duly certified copies of all records and entries, official bonds, or other papers belonging to any public office or by authority of law filed to be kept therein are evidence in all cases." Section 5576 reads: "The term 'record' used in the foregoing section includes any record of any county, common law, circuit, criminal or chancery court, and, in general, every public record required by law to be kept in any court of this State; and also the books of the registers, the surveyors, and the entry takers throughout the State."

No form for such certificate is prescribed in our statutes or decisions. The matter must therefore be determined on principle. A certificate of the register of

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deeds is simply a statement under oath by a public officer that what he has copied preceding his certificate is a true copy of his record. The best form is that the transcript contains a full, true, and complete copy of the record, document, or paper; however, it has been held sufficient that a certificate stating that the above is "a true and correct transcript of the record of the proceedings in this case, as the same remains of record in my office" was good. *Butler v. Owen*, 7 Ark., 369. The following has been held sufficient: "The within and foregoing writing is a true copy of a deed made by Isaac Bull to George Turman on record in my office in Book R. R., page 75." *Vickery v. Benson*, 26 Ga., 582. "The above and foregoing is a true copy," etc., has been held to be a sufficient certificate. *Harden v. Webster*, 29 Ga., 427. In *Reeves v. State*, 7 Cold., 96, the following certificate of a record in the comptroller's office was held to be good: "I certify that the foregoing is correct, as appears from vouchers, etc., now on file in my office. G. W. Blackburn. Comptroller's Office, Nashville, Tennessee, 1869." The court said this certificate was not as formal as it might have been, but that it was sufficient to authorize the paper to be read in evidence. 7 Cold., 96, 105, 106.

But the point stressed in the petition to rehear is that the register, in his certificate, used the words "foregoing grant and certificates." As we understand the argument contained in the petition to rehear, and the accompanying brief, it is that the certificate only covered

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the technical grant from the State, and not the deed on the back of the grant, conveying to David Schoolfield the land described in the grant. This point is, we think, fully covered in the original opinion. An examination of all that precedes the register's certificate shows that it but constitutes one instrument, with the acknowledgment thereof, taken before the clerk. It is certainly true, as said by counsel in the petition to rehear, that we have not before us the State's original grant, so that we can see actually written upon its back the deed made by Henderson Pope to David Schoolfield; but it is clear to any disinterested mind that this must have been the case, because the deed says: "Know all men by these presents that I, Henderson Pope, *the grantee within named*, . . . have granted, bargained, sold, assigned and set over, and by these presents do grant, bargain, sell, assign, and set over unto David Schoolfield . . . *the within named tract of land* containing five thousand acres, *and described as therein mentioned.*" It is clear, from the connection of the two papers, that Henderson Pope, having in his possession the grant, wrote on the back of it his deed to David Schoolfield, and took it to the clerk of the court named, and there acknowledged his deed. It is equally clear that the register of Marion county, when he made his certificate, on the 8th of February, 1910, conceived that he was certifying as a correct copy of his record all that preceded his certificate. It was not required that he should correctly designate the legal nature of the instrument certified. He says in his certificate that it is a true copy of what appears on

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his record in Book C, page 374. Whether the register understood that the writing on the back of the grant was a part of the grant, or whether he understood that the grant was a part of the deed, and spoke of the latter as the grant, as deeds are sometimes denominated, and that the technical grant was used, as it truly was, for purposes of description, and really was a part of the deed, is not material. We can see from the whole writing, taken together, that it was but one instrument, and that was the deed written on the back of the grant; the grant being, as stated, a part of the deed used for purposes of description. Any other conclusion would be nothing but a hairsplitting distinction, without substance or merit. If we had any substantial doubt about the correctness of the view we take, we would remand the case to the court below, with leave to produce a proper certificate of the contents of the record, since we have no doubt that justice would be promoted thereby, and that the opposite course would be a sacrifice of justice to barren technicalities.

Let the petition to rehear be overruled.

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JAMES D. RICHARDSON, JR., *Admr.*, v. MRS. TABITHA F.
VICK *et al.*

(*Nashville.* December Term, 1911.)

1. **CONTRACTS.** Procured by fraud are voidable at option of defrauded party, when.

It is elementary law, of universal application, that fraud renders all contracts voidable, *ab initio*, at the option of the defrauded party, when diligently exercised, in the absence of intervening rights of innocent third persons, since there is no real assent to the contract, where it was procured by fraud. (*Post*, p. 540.)

2. **SAME.** Sales and possession procured by fraudulent representations as to solvency may be disaffirmed, and title and possession regained.

Where one has induced another to sell and deliver to him property, on a credit, by false and fraudulent representations of solvency, with the intention of not paying for it, the seller has the right to disaffirm the sale and reinvest in himself the title to the property, and reclaim possession. (*Post*, pp. 540, 541.)

Cases cited and approved: *Belding v. Frankland*, 8 Lea, 67; *Donaldson v. Farwell*, 93 U. S., 632.

3. **SALES.** Purchaser's intent not to pay for goods is established by his hopeless insolvency, without actual false representations, when.

The fraudulent intent not to pay for property purchased may be deduced from the facts and circumstances, where no actual false representations of solvency are made, as where the purchaser has full knowledge of his insolvency and inability to pay; and false representations of solvency knowingly and purposely made to induce a sale and delivery of goods upon a credit, when the purchaser is hopelessly insolvent, are sufficient

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to establish the fraudulent intent not to pay for them, because his condition must necessarily preclude any honest intent to the contrary. (*Post*, p. 541.)

Cases cited and approved: *Belding v. Frankland*, 8 Lea, 67; *Katzenberger v. Leedom*, 103 Tenn., 144; *Talcott v. Henderson*, 31 Ohio St., 162.

4. SAME. Same. Evidence establishing purchaser's fraudulent intent not to pay for the goods.

In the seller's suit in disaffirmance of the sale and to recover the goods from the purchaser's administrator, where the purchaser procured the possession of the goods upon a credit sale, by the false representations that he was worth from sixty thousand to seventy thousand dollars, made for that purpose, when he knew that he was hopelessly insolvent, and could not have possibly had any reasonable expectation of making payment, the facts present a strong case for the application of the rule in the preceding headnote, and show the purchaser's fraudulent intent not to pay for the goods. (*Post*, pp. 542, 543.)

5. SAME. Same. Same. To avoid sale, false representations as to solvency need not be the sole, if material, consideration for credit.

To avoid a sale, it is not necessary that the purchaser's false representations as to his solvency be the sole and exclusive consideration for the credit, but only that they be a material consideration, without which the credit would probably not have been extended. (*Post*, p. 542.)

Case cited and approved: *In re Marco Gany* (D. C.), 4 Am. Bankr. Rep., 576, 103 Fed., 930.

6. SAME. Of goods to firm on the sole credit of one partner and his false and fraudulent representations as to his financial condition is invalid, though the other partner is solvent.

Where goods were sold and delivered to a firm upon the exclusive credit of the only one of the partners known to the seller, a credit established by previous dealings, and upon his

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false and fraudulent representations as to his financial condition, made without intention to pay for the goods and to induce the giving of the credit, which was extended exclusively to the partner making such representations, the mere fact that the other partner was solvent does not make the sale valid, especially where, after the dissolution of the firm, the seller released the other partner without any knowledge of their real financial condition; for the seller cannot be bound upon a contract to which his mind did not assent, and which he did not make. (*Post*, pp. 542, 543.)

7. ADMINISTRATION. Statute for ratable payment of debts of insolvent decedents does not affect fixed liens.

The statute (section 4065 of Shannon's Code), providing that insolvent estates of decedents shall be divided among the creditors ratably, and that no action, judgment, bill, or note shall have precedence over unliquidated accounts presented and filed, but that all such claims shall be acted upon as being of equal grade, was enacted and intended to abrogate the common law distinctions, between debts due, on account of the character or form of the evidence of the debt, to abolish all rules of priority or preference in the payment of the debts of insolvent decedents, arising from the nature, degree, or dignity of the debt, and, in case of the deficiency of assets, to place all creditors upon the same footing of absolute equality, by compelling a *pro rata* distribution of the assets, and was not intended to affect or impair the liens acquired or fixed upon property of debtors during life, but to secure a ratable division of the assets subject to the payment of general debts. (*Post*, pp. 543, 544.)

Code cited and construed: Sec. 4065 (S.); sec. 3170 (M. & V.); sec. 2326 (T. & S. and 1858).

Cases cited and approved: *Rains v. Rainey*, 11 Hum., 261; *Fields v. Wheatley*, 1 Sneed, 354; *Winton v. Eldridge*, 3 Head, 361; *Parchman v. Charlton*, 1 Cold., 382; *Kinsey v. McDearmon*, 5 Cold., 392; *Bacchus v. Peters*, 85 Tenn., 680.

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8. **SALES.** Avoided for fraud of vendee vests title and right of possession, and not a mere lien, in the seller, not defeated by suggestion of insolvency of vendee's estate.

The seller of goods delivered to the vendee upon his false and fraudulent representations as to his solvency, made with the intention to obtain credit and not to pay for the goods, may disaffirm the sale and recover the goods, even after the death of the vendee and the suggestion of insolvency of his estate, because, upon such disaffirmance, the title and right of possession of the goods vest in the seller, and not a mere lien upon the goods, either inchoate or fixed. (*Post*, pp. 544, 545.)

9. **SAME.** Avoided for fraud of vendee, and goods recovered after vendee's general assignment or bankruptcy.

Where a sale of goods upon a credit was induced by the buyer's false and fraudulent representations as to his solvency, the seller can recover his property, notwithstanding a valid assignment made to secure general creditors, or the fact that the debtor has been declared a bankrupt. (*Post*, pp. 545, 546.)

Cases cited and approved: *Belding v. Frankland*, 8 Lea, 67; *Donaldson v. Farwell*, 93 U. S., 632; *In re Hamilton Furniture Co.* (D. C.), 117 Fed., 774.

10. **Same.** Avoided for vendee's fraud, as soon as learned, entitles seller to rescission and recovery of the goods, even after suggestion of insolvency of vendee's estate; no laches.

Where the seller of goods, upon a credit induced by the purchaser's false and fraudulent representations as to his solvency, promptly disaffirmed the sale and brought petition to recover possession, upon his first knowledge of the falsity of such representations and the insolvency of the estate of the deceased purchaser, obtained from the suggestion of the insolvency of his estate by the administrator thereof; such seller is not guilty of laches, and is entitled to a recovery, especially where the rights of no innocent third parties have intervened or attached. (*Post*, p. 546.)

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FROM RUTHERFORD.

Appeal from the Chancery Court of Rutherford County.—WALTER S. BEARDEN, Chancellor.

RIDLEY & RICHARDSON, for complainant.

P. D. MADDIN, for Kentucky Wagon & Manufacturing Co. and John Deere Plow Co.

JOHN R. AUST, for Deeds & Hersig Manufacturing Co.

W. H. WILLIAMSON, for Dilkes Bros. Co.

JESSE W. SPARKS, for Allen C. Johnson.

MR. CHIEF JUSTICE SHIELDS delivered the opinion of the Court.

Complainant, Jas. D. Richardson, Jr., administrator of Will A. Vick, deceased, brought this bill against the heirs and creditors of his intestate, in the chancery court of Rutherford county, to have the estate of the intestate there administered as an insolvent estate. The decedent died July 2, 1909. Complainant was appointed and qualified as administrator July 9, 1909, and, having first duly suggested the insolvency of the estate, filed the bill in this cause July 20, 1909. Thereafter the bill was sustained as an insolvent bill, and all creditors enjoined

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from proceeding against the estate otherwise than in this cause.

The cause is now before this court upon petitions filed therein August 16, 1909, by the Kentucky Wagon & Manufacturing Company, a corporation, and November 26, 1909, by the Deeds & Hersig Manufacturing Company, a corporation, to review the decree of the chancellor in favor of the petitioners.

The facts charged in the respective petitions of the Kentucky Wagon & Manufacturing Company and the Deeds & Hersig Manufacturing Company, and appearing in the proof, upon which petitioners seek relief, are these:

W. A. Vick was a retail dealer in wagons and other vehicles previous to January 1, 1909, in the city of Murfreesboro. On the day named he formed a partnership with Allen C. Johnson for the purpose of conducting the same business, which continued in existence until June 1, 1909, upon which day it was dissolved, and by the terms of the dissolution Vick agreed to take all the vehicles in stock, and assume and pay all indebtedness of the firm due on account of the purchase of the same. He continued in business until July 2d next, when, as stated above, he died intestate and wholly insolvent; the assets of his estate aggregating less than \$10,000, and his indebtedness more than \$75,000.

The Kentucky Wagon & Manufacturing Company, previous to January 1, 1909, had consigned vehicles to W. A. Vick, as agent, for sale, and about that day, upon his request, accepted his note for the cost price of five

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wagons, which he then had in his warehouse, belonging to the company. While Vick and Johnson were partners, about March 16, 1909, this petitioner sold the firm fifty-two wagons on credit, taking their notes for the purchase money. When Vick & Johnson dissolved partnership, upon the request of Vick, petitioner surrendered the notes of Vick & Johnson, and accepted those of Vick for all the indebtedness due it.

The petitioner Deeds & Hersig Manufacturing Company sold to Vick & Johnson, as partners, twenty-nine vehicles, taking their notes for the purchase money, which upon the dissolution of the firm, were taken up by Vick and his notes accepted in lieu of the same.

When Vick died, all the vehicles purchased from the petitioners were in his warehouse at Murfreesboro, were susceptible of identification, and came to the hand of his administrator, and the several notes given by him for the purchase money were all unpaid.

W. A. Vick, for some years previous to January 1, 1909, had dealt with both petitioners, and had falsely and fraudulently represented to them, respectively, for the purpose of obtaining credit for vehicles purchased, that he was solvent and worth from \$60,000 to \$70,000 above all his indebtedness. He also made from year to year reports of his financial condition to mercantile agencies of which petitioners were subscribers, for the purpose of obtaining credit, and which he knew would be supplied to and acted upon by petitioners, showing his condition to be as represented to petitioner, which reports were received and acted upon by them. These

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representations of the said Vick were false and fraudulent, as he at the time he made them well knew that he was wholly insolvent, and unable to pay more than ten to twenty per cent. of his indebtedness. One of these statements was made to Deeds & Hersig Manufacturing Company in January, 1909. Just previous to the dissolution of the partnership between Vick and Johnson, the former made these representations to both of the petitioners, and in that way induced them to accept his notes for those of the firm, and release Johnson, who was solvent. They knew nothing of Vick's insolvency until after his death, and when it was suggested by his administrator.

The petitioners had not, previous to January 1, 1909, dealt with Allen C. Johnson, and did not know him or his financial condition, and in the subsequent dealings with the firm gave it credit upon the faith of the representations made them by Vick of his financial condition. Vick was at this time aware of his insolvency, and knew he could not pay for the property sold him.

Petitioners, respectively, charge that they were induced to sell and deliver the vehicles sold by the Kentucky Wagon & Manufacturing Company to Vick previous to January 1, 1909, and those to the firm of Vick & Johnson after that date on a credit, as stated, and to accept the individual notes for those of the firm, by the false and fraudulent representations made by Vick, as above shown, and that, on account of the fraud thus knowingly and deliberately perpetrated upon them, the said

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sales were and are voidable, and that they have the right to disaffirm the same and recover their property from the administrator of the said Vick, and for this purpose filed their petitions and prayed for appropriate relief, which was granted them by the chancellor, and this decree complainant now seeks to have reversed by this court.

There is no error in this decree. It is elementary law, of universal application, that fraud renders all contracts voidable, *ab initio*, at the option of the defrauded party, when diligently exercised, in the absence of intervening rights of innocent third parties. Contracts are not binding where the minds of the parties do not meet and assent to their terms, and there is no real assent where the will of one has been controlled, and his assent procured, by deception and fraud. Where this has been done the contract is voidable, and the party defrauded has the right to rescind it and reassert his original *status* and rights.

A common case for the application of this principle is where one had induced another to sell and deliver to him property, on a credit, by false and fraudulent representations of solvency, with the intention of not paying for it. In such cases the vendor has the right to disaffirm the same and reinvest in himself the title to the property and reclaim possession. This court said:

“It is now settled, both in England and America, that, if a person purchase goods with the fraudulent intention of not paying for them, the vendor may disaffirm the sale, although the goods be delivered, and reinvest

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the property in him, and recover them by action against the vendee." *Belding Bros. v. Frankland*, 8 Lea, 67, 41 Am. Rep., 630.

The supreme court of the United States has stated the rule in these words:

"The doctrine is now well established by a preponderance of authority that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on a credit, by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods." *Donaldson v. Farwell*, 93 U. S., 632, 23 L. Ed., 993.

The fraudulent intent not to pay for the property purchased may be deduced from the facts and circumstances, where no actual false representations of solvency are made, when the purchaser has full knowledge of his insolvent condition and inability to make payment.

And false representations of solvency, knowingly and purposely made to induce the vendor to sell and deliver the goods on a credit, when the purchaser is hopelessly insolvent, are sufficient to establish the fraudulent intent not to pay for them, as his condition must necessarily preclude any honest intent to the contrary. *Belding v. Frankland*, supra; *Katzenberger v. Leedom Co.*, 103 Tenn., 144, 52 S. W., 35; *Talcott v. Henderson*, 31 Ohio St., 162, 27 Am. Rep., 501; Remington on

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JAMES D. RICHARDSON, JR., *Admr.*, v. MRS. TABITHA F.
VICK *et al.*

(*Nashville.* December Term, 1911.)

1. **CONTRACTS.** Procured by fraud are voidable at option of defrauded party, when.

It is elementary law, of universal application, that fraud renders all contracts voidable, *ab initio*, at the option of the defrauded party, when diligently exercised, in the absence of intervening rights of innocent third persons, since there is no real assent to the contract, where it was procured by fraud. (*Post*, p. 540.)

2. **SAME.** Sales and possession procured by fraudulent representations as to solvency may be disaffirmed, and title and possession regained.

Where one has induced another to sell and deliver to him property, on a credit, by false and fraudulent representations of solvency, with the intention of not paying for it, the seller has the right to disaffirm the sale and reinvest in himself the title to the property, and reclaim possession. (*Post*, pp. 540, 541.)

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3. **SALES.** Purchaser's intent not to pay for goods is established by his hopeless insolvency, without actual false representations, when.

The fraudulent intent not to pay for property purchased may be deduced from the facts and circumstances, where no actual false representations of solvency are made, as where the purchaser has full knowledge of his insolvency and inability to pay; and false representations of solvency knowingly and purposely made to induce a sale and delivery of goods upon a credit, when the purchaser is hopelessly insolvent, are sufficient

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to establish the fraudulent intent not to pay for them, because his condition must necessarily preclude any honest intent to the contrary. (*Post*, p. 541.)

Cases cited and approved: *Belding v. Frankland*, 8 Lea, 67; *Katzenberger v. Leedom*, 103 Tenn., 144; *Talcott v. Henderson*, 31 Ohio St., 162.

4. **SAME.** Same. Evidence establishing purchaser's fraudulent intent not to pay for the goods.

In the seller's suit in disaffirmance of the sale and to recover the goods from the purchaser's administrator, where the purchaser procured the possession of the goods upon a credit sale, by the false representations that he was worth from sixty thousand to seventy thousand dollars, made for that purpose, when he knew that he was hopelessly insolvent, and could not have possibly had any reasonable expectation of making payment, the facts present a strong case for the application of the rule in the preceding headnote, and show the purchaser's fraudulent intent not to pay for the goods. (*Post*, pp. 542, 543.)

5. **SAME.** Same. Same. To avoid sale, false representations as to solvency need not be the sole, if material, consideration for credit.

To avoid a sale, it is not necessary that the purchaser's false representations as to his solvency be the sole and exclusive consideration for the credit, but only that they be a material consideration, without which the credit would probably not have been extended. (*Post*, p. 542.)

Case cited and approved: *In re Marco Gany* (D. C.), 4 Am. Bankr. Rep., 576, 103 Fed., 930.

6. **SAME.** Of goods to firm on the sole credit of one partner and his false and fraudulent representations as to his financial condition is invalid, though the other partner is solvent.

Where goods were sold and delivered to a firm upon the exclusive credit of the only one of the partners known to the seller, a credit established by previous dealings, and upon his

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false and fraudulent representations as to his financial condition, made without intention to pay for the goods and to induce the giving of the credit, which was extended exclusively to the partner making such representations, the mere fact that the other partner was solvent does not make the sale valid, especially where, after the dissolution of the firm, the seller released the other partner without any knowledge of their real financial condition; for the seller cannot be bound upon a contract to which his mind did not assent, and which he did not make. (*Post*, pp. 542, 543.)

7. ADMINISTRATION. Statute for ratable payment of debts of insolvent decedents does not affect fixed liens.

The statute (section 4065 of Shannon's Code), providing that insolvent estates of decedents shall be divided among the creditors ratably, and that no action, judgment, bill, or note shall have precedence over unliquidated accounts presented and filed, but that all such claims shall be acted upon as being of equal grade, was enacted and intended to abrogate the common law distinctions, between debts due, on account of the character or form of the evidence of the debt, to abolish all rules of priority or preference in the payment of the debts of insolvent decedents, arising from the nature, degree, or dignity of the debt, and, in case of the deficiency of assets, to place all creditors upon the same footing of absolute equality, by compelling a *pro rata* distribution of the assets, and was not intended to affect or impair the liens acquired or fixed upon property of debtors during life, but to secure a ratable division of the assets subject to the payment of general debts. (*Post*, pp. 543, 544.)

Code cited and construed: Sec. 4065 (S.); sec. 3170 (M. & V.); sec. 2326 (T. & S. and 1858).

Cases cited and approved: *Rains v. Rainey*, 11 Hum., 261; *Fields v. Wheatley*, 1 Sneed, 354; *Winton v. Eldridge*, 3 Head, 361; *Parchman v. Charlton*, 1 Cold., 382; *Kinsey v. McDearmon*, 5 Cold., 392; *Bacchus v. Peters*, 85 Tenn., 680.

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8. **SALES.** Avoided for fraud of vendee vests title and right of possession, and not a mere lien, in the seller, not defeated by suggestion of insolvency of vendee's estate.

The seller of goods delivered to the vendee upon his false and fraudulent representations as to his solvency, made with the intention to obtain credit and not to pay for the goods, may disaffirm the sale and recover the goods, even after the death of the vendee and the suggestion of insolvency of his estate, because, upon such disaffirmance, the title and right of possession of the goods vest in the seller, and not a mere lien upon the goods, either inchoate or fixed. (*Post*, pp. 544, 545.)

9. **SAME.** Avoided for fraud of vendee, and goods recovered after vendee's general assignment or bankruptcy.

Where a sale of goods upon a credit was induced by the buyer's false and fraudulent representations as to his solvency, the seller can recover his property, notwithstanding a valid assignment made to secure general creditors, or the fact that the debtor has been declared a bankrupt. (*Post*, pp. 545, 546.)

Cases cited and approved: *Belding v. Frankland*, 8 Lea, 67; *Donaldson v. Farwell*, 93 U. S., 632; *In re Hamilton Furniture Co.* (D. C.), 117 Fed., 774.

10. **Same.** Avoided for vendee's fraud, as soon as learned, entitles seller to rescission and recovery of the goods, even after suggestion of insolvency of vendee's estate; no laches.

Where the seller of goods, upon a credit induced by the purchaser's false and fraudulent representations as to his solvency, promptly disaffirmed the sale and brought petition to recover possession, upon his first knowledge of the falsity of such representations and the insolvency of the estate of the deceased purchaser, obtained from the suggestion of the insolvency of his estate by the administrator thereof; such seller is not guilty of laches, and is entitled to a recovery, especially where the rights of no innocent third parties have intervened or attached. (*Post*, p. 546.)

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the fraud of the bankrupt for the benefit of other creditors; that creditors have no right to profit by the fraud of the bankrupt, to the wrong and injury of those who have been deceived and defrauded. The case in which this was said is almost identical in its facts with the one under consideration, and the vendor was allowed to recover from the trustee in bankruptcy the property which he had been induced to sell and deliver, on a credit, by the fraudulent misrepresentations of the vendee of his financial condition. *In re Hamilton Furniture Co.* (D. C.), 117 Fed., 774.

The petitioners are not creditors of the insolvent and deceased debtor. They have disaffirmed the contracts made with him, and merely claim the property which he fraudulently procured from them. The rights of no innocent third parties have intervened or attached. Petitioners have been guilty of no laches, and have not, since the fraud was discovered, reaffirmed the contracts made with them. Their first knowledge of the falsity of the representations made then, and of the insolvency of the deceased, was the suggestion of the insolvency of his estate by the complainant. They then promptly disaffirmed the sales made by them, and brought their petitions in this cause, under the orders of the court, to recover possession.

The decree of the chancellor, awarding them the possession of the property, as we have above stated, is correct, and must be affirmed.

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LEM MOTLOW v. STATE.*

(*Nashville*. December Term, 1911.)

1. **CONSTITUTIONAL LAW.** Classification of police laws is permitted unless purely arbitrary and without reasonable basis.

The provision of the eighth section of the first article of our State constitution, embracing "the law of the land" clause, when read in connection with the first clause of the eighth section of the eleventh article the same constitution, is substantially the same as that contained in the second clause of the first section of the fourteenth amendment to the federal constitution, and does not take from the State the power of classification in the enactment of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and, therefore, purely arbitrary; for a classification having some reasonable basis does not offend against that provision merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (*Post*, pp. 559, 560.)

Constitution cited and construed: State const., art. 1, sec. 8; art. 11, sec. 8, cl. 1; federal const., 14th am., sec. 1, cl. 2.

Case cited and approved: *Lindsley v. Gas Co.*, 220 U. S., 61.

2. **SAME.** Same. Presumption of facts sustaining classification in police laws; burden on assailant of classification.

When the classification in a police law is called in question, or asserted to be in conflict with said constitutional provisions (art. 1, sec. 8, and art. 11, sec. 8), any state of facts that can be reasonably conceived that would sustain it will be assumed to have existed when the law was enacted; and one assailing the classification in such law must bear the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. (*Post*, pp. 559, 560.)

Citations: See under preceding headnote.

*Constitutional right to prohibit sale of intoxicating liquor, see note in 15 L. R. A. (N. S.), 908.

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3. INTOXICATING LIQUORS. Licenses may be issued for their sale for certain nonbeverage purposes.

Acts 1909, chs. 13 and 14, when construed in connection with Acts 1899, ch. 161, and Acts 1909, chs. 1 and 10, were not intended as a general withdrawal of the power to issue licenses, except for the sale of intoxicating liquors as a beverage, and thereunder a license may still be issued, under which the holder may sell intoxicating liquors for medical, mechanical, chemical, scientific, and sacramental purposes, and for these purposes only (*Post*, pp. 560-562.)

Acts cited and construed: Acts 1899, ch. 161; Acts 1909, chs. 1, 10, 13, 14.

Cases cited and approved: *Druggist Cases*, 85 Tenn., 449, 457; *Kelly v. State*, 123 Tenn., 516, 531 *et seq.*, 550.

4. SAME. Alcohol 188 proof is an "intoxicating liquor," included in the statutory classes of intoxicating liquors.

Alcohol 188 proof, expressly excepted from the statute (Acts 1909, ch. 10) which prohibits the manufacture of intoxicating liquors, including all vinous, spirituous, or malt liquors, for purposes of sale, is an "intoxicating liquor" included within said classes, and not exclusive thereof. (*Post*, p. 562.)

Case cited and approved: *Marks v. State*, 159 Ala., 71, 83.

5. CONSTITUTIONAL LAW. Statute prohibiting manufacture of intoxicating liquors for sale, excepting alcohol 188 proof, is not invalid for its such classification.

The statute (Acts 1909, ch. 10), which in effect puts the manufacturers of intoxicating liquors in a separate class, by forbidding them to manufacture, for sale, any intoxicating liquors, including all vinous, spirituous, or malt liquors, all of which may be sold for certain nonbeverage purposes, excepting the manufacture of alcohol 188 proof for chemical, pharmaceutical, medical, and bacteriological purposes, has a reasonable tendency towards making the other prohibition laws more effective by diminishing the quantity of such liquor and making it more

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difficult and expensive to obtain the same, and hence rests upon a sufficient ground for the classification. (*Post*, pp. 559, 562, 563.)

Acts cited and construed: Acts 1909, ch. 10.

6. **INTOXICATING LIQUORS.** Judicial notice of activities of brewers and distillers in opening and maintaining saloons to sell their products.

It is a matter of judicial knowledge on the part of the supreme court, arising out of the history of the liquor litigation in this State, that the breweries actively encourage and foster the opening and maintaining of saloons to enable them to sell their product, and that distilleries have places where the product is stored for the convenience of the market. (*Post*, p. 563.)

7. **CONSTITUTIONAL LAW.** Statute prohibiting manufacture of intoxicating liquors, for sale, but excepting alcohol 188 proof, is not invalid for its classification.

The statute (Acts 1909, ch. 10), prohibiting the manufacture of any intoxicating liquor, including all vinous, spirituous, or malt liquors, for purposes of sale, but allowing the manufacture of alcohol of not less than 188 proof for chemical, pharmaceutical, medical, and bacteriological purposes, is not arbitrary or unreasonable in its classification, on account of such exception of alcohol, since alcohol of 188 proof would have far less tendency than commercial liquors to impair the operation of the prohibition laws, and since there is no discrimination except as to the grade of the product, and no discrimination as against the manufactures themselves. (*Post*, pp. 563-565.)

Acts cited and construed: Acts 1909, ch. 10.

8. **SAME.** Same. Such statute does not unjustly, unreasonably, and arbitrarily discriminate against liquor manufacturers in this State and in favor of those in other States.

The statute (Acts 1909, ch. 10) does not, by its provisions stated in the preceding headnote, unjustly, unreasonably, and arbitrarily discriminate against liquor manufacturers in this State and in favor of liquor manufacturers in other States, whose

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products may be sold here for medical and other nonbeverage purposes, through the means of interstate commerce importations into this State, because the object of the statute is to prevent the impairment and violation of the prohibition laws, and the local manufacturers, if not prohibited, could easily make much more than would be required for such medical and other nonbeverage purposes, and it would be expensive and difficult, if not impossible, to prevent sales of their products in violation and impairment of the prohibition laws. (*Post*, pp. 565, 567.)

Acts cited and construed: Acts 1909, ch. 10.

9. INTERSTATE COMMERCE. Importation of intoxicating liquors from other States cannot be prohibited by the State; failure to attempt it is no discrimination.

The State has no power to prohibit the importations of intoxicating liquors from other States or countries, as such traffic is regulated wholly by federal law; and no discrimination can be rightly charged on the ground that the State fails to act on a matter as to which it has no power. (*Post*, pp. 565, 566.)

10. INTOXICATING LIQUORS. Prohibition of their manufacture for lawful sale here is within the police power.

While it is lawful to sell, in this State, intoxicating liquors (such as whisky, brandy, wine, beer, and ale), for medical and other nonbeverage purposes, still it is within the police power of the State to forbid the manufacture of such liquors for sale. (*Post*, pp. 566-571.)

Acts cited and construed: Acts 1909, ch. 10.

Cases cited and approved: *Thellan v. Porter*, 14 Lea, 622; *Neas v. Borches*, 109 Tenn., 398; *Kidd v. Pearson*, 128 U. S., 19-22; *Crowley v. Christensen*, 137 U. S., 86, 90, 91, 92; *Lawton v. Steele*, 152 U. S., 133, 136; *Lemieux v. Young*, 211 U. S., 489; *Kidd v. Musselman*, 217 U. S., 461; *Schmidt v. Indianapolis*, 168 Ind., 631.

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11. **CONSTITUTIONAL LAW.** Legislative power is complete except as restrained by State or federal constitution.

The legislative power is complete, except in the particulars in which it is restrained by the constitution of the State or that of the United States. (*Post*, p. 566.)

12. **SAME.** Same. Restrictions in constitution must be pointed out.

Whoever would deny the power of the legislature to pass any act on the ground of constitutional restrictions must be able to put his finger on the clause in the constitution which creates the restriction, or from which there is such necessary implication. (*Post*, p. 566.)

Cases cited and approved: *Demoville v. Davidson Co.*, 87 Tenn., 214; *Stratton v. Morris*, 89 Tenn., 497; *Redistricting Cases*, 111 Tenn., 234, 291.

13. **SAME.** Criminal laws involving life and liberty are based upon police power and may include manufacture of intoxicating liquors.

The whole body of the criminal law is but a branch of the police power, under which men and women may be deprived of their liberty and their lives, and there is nothing in the manufacture of whisky greater than these. (*Post*, pp. 571, 572.)

14. **INTOXICATING LIQUORS.** Manufacture and sale may be totally prohibited by the State.

The State has the power to enact legislation totally prohibiting the manufacture and sale of intoxicating liquors. (*Post*, pp. 572-582.)

Cases cited and approved: *Druggist Cases*, 85 Tenn., 458; *Webster v. State*, 110 Tenn., 491, 504, 506; *Kelly v. Connor*, 122 Tenn., 339, 374, 375; *Bartemeyer v. Iowa*, 18 Wall., 129; *Boston Beer Co. v. Massachusetts*, 97 U. S., 25; *Foster v. Kansas*, 112 U. S., 205; *Mugler v. Kansas*, 123 U. S., 623; *Powell v. Pennsylvania*, 127 U. S., 678; *Kidd v. Pearson*, 128 U. S., 1; *Schollenberger v. Pennsylvania*, 171 U. S., 1; *Dairy Co. v. Ohio*, 183 U. S., 238,

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246; *State v. Durein*, 70 Kan., 1; *Cureton v. State*, 135 Ga., 660; *Sarrls v. Commonwealth*, 83 Ky., 327.

15. CONSTITUTIONAL LAW. Prohibitory statute including innocent acts because of difficulty in separating the good from the bad, and fraud, is not unconstitutional.

A prohibitory statute, passed under the police power of the State, although it is so broad as to include within its scope acts otherwise innocent, but included because of the difficulty of separating the good from the bad, and because of the danger of fraud, does not violate the provisions of the fourteenth amendment to the constitution of the United States. (*Post*, pp. 582-588.)

Constitution (U. S.) cited and construed: 14th am.

Cases cited and approved: *Booth v. Illinois*, 184 U. S., 425, 428; *Otis v. Parker*, 187 U. S., 606; *Ah Sin v. Wittman*, 198 U. S., 500.

16. INTOXICATING LIQUORS. Manufacture may be totally prohibited, though sales be permitted for certain nonbeverage purposes.

Although it is lawful to sell intoxicating liquors in this State for medical, mechanical, and scientific purposes, the manufacture of such articles in this State, though in and of itself not immoral, may be prohibited, because of the great opportunity afforded by the presence of breweries and distilleries for aiding those whose purpose and desire to violate the laws prohibiting the sale of intoxicating liquors as a beverage, and because of the temptation on the part of the brewers and distillers themselves to encourage such violations in order to make profits (*Post*, pp. 587, 588.)

See citations under preceding headnote.

17. CONSTITUTIONAL LAW. Manufacture of intoxicating liquors for sale and exportation to other States and countries may be prohibited.

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The State legislature has the constitutional power to enact laws prohibiting the manufacture of intoxicating liquors for sale and exportation to other States and countries. (*Post*, pp. 588, 589.)

Case cited and approved: *Kidd v. Pearson*, 128 U. S., 19, 20.

18. **INTOXICATING LIQUORS.** Manufacture for sale, but not for sale as a beverage in this State, means for sale abroad, and for nonbeverage purposes in Tennessee.

The manufacture of intoxicating liquors "for purposes of sale," but not "for purposes of sale as a beverage within the State of Tennessee," can only mean that the manufacture is for the purpose of sale abroad, and also for the purpose of sale in Tennessee for medical, mechanical, and scientific purposes. (*Post*, pp. 588, 589.)

19. **POLICE POWER.** Its scope and extent for preservation of public safety, health, and morals is undefined.

The police power is a necessary power, inhering in every sovereignty, for the preservation of the public safety, the public health, and the public morals. It is of vast and undefined extent, expanding and enlarging in the multiplicity of its activities as exigencies demanding its service arise in the development of our complex civilization. (*Post*, p. 589.)

20. **SAME.** Function of government solely for the legislature's judgment as to its policy and wisdom.

It is a function of government, solely within the domain of the legislature, to declare when the police power shall be brought into operation, for the protection or advancement of the public welfare, and to judge of the wisdom and policy of the law. (*Post*, p. 589.)

21. **SAME. Same.** Function of courts to determine whether statute tends to protect public safety, health, and morals, and whether constitutional.

In determining whether a statute enacted under the police power, and discriminating between particular classes of persons, is reasonable, the courts have no power to pass upon the statute

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with a view to determining whether it was dictated by a wise or foolish policy, or whether it will ultimately redound to the public good, or whether it is contrary to natural justice and equity, because these are considerations solely for the legislature; but the function of the courts is merely to decide whether it has any real tendency to carry into effect the purposes designed, namely, the protection of the public safety, the public health, or the public morals, and whether that is really the end had in view, and whether the interests of the public generally, as distinguished from those of a particular class, required such interference, and whether the statute in question violates any provision of the State or federal constitution. (*Post*, pp. 589, 590.)

22. SAME. Same. Same. Constitutional provisions authorizing courts to control legislative exercise of police power.

The constitutional provisions authorizing the courts to assert control over the exercise of the police power by the legislature are, among others, article 1, section 8, and article 11, section 8, of our State constitution, and the fourteenth amendment to the federal constitution, which are in effect the same, and which provide in substance that no one shall be deprived of his life, liberty, or property but by due process of law, or the law of the land, and that no one shall be deprived of the equal protection of the laws. (*Post*, p. 590.)

Constitution cited and construed: Art. 1, sec. 8, and art. 11., sec. 8 (State); 14th am. (U. S.).

23. CLASSIFICATION IN LEGISLATION. Must rest upon some natural or reasonable basis, and be approximately applicable to all members of the class.

The constitutional provisions mentioned in the preceding head-note forbid that any mere individual shall be singled out for legislative action, but do not deny the right to the legislature to make proper classifications for purposes of legislation; but such classification must rest upon some natural or reasonable basis, having some substantial relation to the public welfare,

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and the same provisions must approximately apply in the same way to all the members of the class. (*Post*, pp. 590, 591, 592.)

Constitution cited and construed: Art. 1, sec. 8, and art. 11, sec. 8 (State); 14th am. (U. S.).

Cases cited and approved: *Marr v. Bank*, 4 Lea, 578, 585; *Leeper v. State*, 103 Tenn., 500, 531; *Dayton v. Barton*, 103 Tenn., 604; *Harbison v. Iron Co.*, 103 Tenn., 421; *Webster v. State*, 110 Tenn., 491, 504, 506; *Samuelson v. State*, 116 Tenn., 470; *Morrison v. State*, 116 Tenn., 534; *Malone v. Williams*, 118 Tenn., 390; *State v. Mill Co.*, 123 Tenn., 399; *Yick Wo v. Hopkins*, 118 U. S., 356; *Mugler v. Kansas*, 123 U. S., 623; *Lawton v. Steele*, 152 U. S., 133; *Railroad v. Ellis*, 165 U. S., 150; *Holden v. Hardy*, 169 U. S., 366; *Otis v. Parker*, 187 U. S., 606, 608; *Railroad v. May*, 194 U. S., 267, 269, 270; *Dobbins v. Los Angeles*, 195 U. S., 223, 236, 237; *Reduction Co. v. Reduction Works*, 199 U. S., 306, 318, 319.

24. SAME. Same. Reasonableness thereof embraces proper classification.

The doctrine of reasonableness in classification in legislation embraces, as a part thereof, the subject of proper classification, as indicated in the preceding headnote, and the two subjects cannot be clearly separated in the authorities; but the cases cited hereunder may be regarded as being especially interesting upon this particular phase of the inquiry. (*Post*, pp. 591, 592.)

Cases cited and approved: *Stratton v. Morris*, 89 Tenn., 497; *Dugger v. Insurance Co.*, 95 Tenn., 245; *Debardelaben v. State*, 99 Tenn., 649; *Railroad v. Harris*, 99 Tenn., 684; *Malone v. Williams*, 118 Tenn., 390; *Ledgerwood v. Pltts*, 122 Tenn., 570; *State v. Railroad*, 124 Tenn., 1; *State, ex rel., v. Powers*, 124 Tenn., 553; *Yick Wo v. Hopkins*, 118 U. S., 356; *Railroad v. Ellis*, 165 U. S., 150; *Holden v. Hardy*, 169 U. S., 366; *Magoun v. Bank*, 170 U. S., 293-296; *Connolly v. Pipe Co.*, 184 U. S., 540, 559, 560; *Railroad v. May*, 194 U. S., 267, 269, 270; *Railroad v. McGuire*, 219 U. S., 549, 565.

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25. SAME. Reasonableness thereof has a wider scope in municipal ordinances than in State legislation under police power.

In cases involving municipal ordinances, the doctrine of reasonableness in classification has a wider scope than in cases of classification in State legislation under the police power, because such ordinances must be tested, not only by the constitution, but also by the statutes of the State, and by the common law (*Post*, p. 591, 592.)

Cases cited and approved: *Maxwell v. Jonesboro*, 11 Heis., 257; *Ward v. Mayor*, 8 Bax., 228; *Grills v. Mayor*, 8 Bax., 247; *Newbern v. McCann*, 105 Tenn., 159; *Yick Wo v. Hopkins*, 118 U. S., 356.

26. CONSTITUTIONAL LAW. Exemption of manufactured articles from taxation does not prevent police legislation prohibiting the manufacture of intoxicating liquors.

The statute (Acts 1909, ch. 10), which in effect puts the manufacturers of intoxicating liquors in a separate class, by forbidding them to manufacture, for sale, any intoxicating liquors, except alcohol 188 proof, does not violate the constitutional provision (art. 2, sec. 30) that "No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees," because the State did not, by the granting of the tax exemption, and thereby encouraging the manufacture of intoxicating liquors, impliedly surrender its police power, the ultimate means of self-preservation, so as to prevent the enactment of legislation prohibiting such manufacture. (*Post*, pp. 559, 593, 594.)

Constitution cited and construed: Art. 2, sec. 30.

27. JUDICIAL NOTICE. None that intoxicating liquors are manufactured out of the produce of this State.

The supreme court cannot take judicial notice that a manufacturer of intoxicating liquors confined himself, in respect to the raw materials used, to the produce of this State, or even that he uses any such raw material of the produce of this State. (*Post*, p. 593.)

Constitution cited and construed: Art. 2, sec. 30.

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FROM MOORE.

Appeal from the Circuit Court of Moore County.—
EWIN L. DAVIS, Judge.

CARTER, LAMB & LAMB, PARKS & BEAN, and FRANK
P. BOND, for Motlow.

ATTORNEY-GENERAL CATES, for State.

MR JUSTICE NEIL delivered the opinion of the Court.

The indictment in the present case charges that Lem Motlow, on the 25th day of May, 1911, in Moore county, this State, unlawfully operated a whisky distillery, "and did then and there distill and manufacture spirituous, vinous, malt, and intoxicating liquors for the purpose of sale, contrary to the statute in such cases made and provided, and against the peace and dignity of the State." There was a motion to quash the indictment, but as the same questions were made on the trial, we shall pass these without further notice.

The agreement as to the evidence was as follows:

That the defendant, Lem Motlow, on the 25th day of May, 1911, was the proprietor of the Jack Daniels distillery, located in Moore county, this State, and on that day manufactured 375 gallons of intoxicating liquors—that is to say, whisky 100 proof—for purposes of sale; "but," continues the agreement, "said whisky

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was not made for purposes of sale as a beverage within the State of Tennessee."

The defendant was convicted, and sentenced to pay a fine of \$250, and to confinement in the county jail for a period of ninety days, and to pay the costs of the proceeding. He thereupon made a motion for new trial, which was overruled, and he then appealed to this court.

The act on which the prosecution was based is chapter 10 of the Acts of 1909, which is as follows:

"An act to prohibit the manufacture in this State of intoxicating liquors for the purpose of sale.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that it shall not hereafter be lawful for any person or persons to manufacture in this State, for purposes of sale, any intoxicating liquor, including all vinous, spirituous, or malt liquors, and that any one violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine, for each offense, of not less than \$250 nor more than \$1,000 and imprisonment for a period of not less than ninety days nor more than twelve months; provided, this section shall not be so construed as to prohibit the manufacture of alcohol of not less than 188 proof for chemical, pharmaceutical, medical, and bacteriological purposes.

"Sec. 2. Be it further enacted, that the grand juries of this State shall have and exercise inquisitorial power in respect to violations of this act, and it shall be the duty of the circuit and criminal judges of the State to give the same in charge to them.

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"Sec. 3. Be it further enacted, that all laws in conflict with this act be, and the same are hereby, repealed.

"Sec. 4. Be it further enacted, that this act shall take effect from and after January 1, 1910, the public welfare requiring it."

This act was passed over the veto of the governor on February 4, 1909.

What the act in question has done is simply to put into a separate class the manufacturers of intoxicating liquors, and forbid them to make for sale any such liquors, except alcohol 188 proof.

Was the creation of such a class an arbitrary act, or is there any reason by which it can be justified? The principles on which the inquiry should be conducted are those laid down in a very recent opinion of the supreme court of the United States, in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S., 61, 31 Sup. Ct., 337, 55 L. Ed., 369: "(1) The equal protection clause of the fourteenth amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore it is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts

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at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." The same rules must apply in disposing of a question arising under article 1, section 8, of our constitution of 1870, embracing the "law of the land" clause, because its provisions are in this regard, taken in connection with the first clause of section 8 of article 11, substantially the same as those contained in the second clause of the first section of the fourteenth amendment to the federal constitution.

At the time the act was passed, the situation in Tennessee was this: Sundry statutes had been passed, known as "four-mile laws," which had made it unlawful to sell intoxicating liquors as a beverage anywhere in the State within four miles of a schoolhouse, whether the school was in session at the date of the sale or not. These acts made it unlawful to sell intoxicating liquors anywhere in this State as a beverage, since there was no point that was not within four miles of a schoolhouse. The last of these acts (chapter 1, Acts of 1909) was passed January 23, 1909, and went into effect July 1, 1909, and made the series of four-mile laws complete. Furthermore, by Acts of 1899, ch. 161, it had been made unlawful to sell intoxicating liquors anywhere in Tennessee for any purpose without a license. No license could be issued which would give authority to violate the four-mile law. Therefore no license could be issued for the sale of intoxicating liquors at any point in Tennessee,

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unless for sale for nonbeverage purposes; that is, for medical, mechanical, chemical, or scientific purposes, and wine for sacramental use. These laws are reviewed in *Kelly v. State*, 123 Tenn., 516 (and see particularly page 531 *et seq.* and page 550), 132 S. W., 193. I am of the opinion, however, that the right to issue licenses for the latter purpose lasted only until July 1, 1909, because on February 5, 1909, chapters 13 and 14 of the Acts of that year were passed, which forbade the issuance of licenses to run for any longer date than July 1, 1909. After that date, as I think, no license for any purpose could be issued, and prohibition was complete in the State. My opinion is that these laws should all be construed together, or in *pari materia*, including Acts of 1899, ch. 161. So construing them, it is evident, as I think, that the purpose of the legislature was that no intoxicating liquors should be sold at all, except alcohol 188 proof, and this only for chemical, medical, pharmaceutical, and bacteriological purposes, for the sale of which no license was required; the statute giving by implication the authority to sell. I think the legislature must be considered as having had in mind chapters 13 and 14 when chapter 10 at the same session was passed; these three acts, with chapter 1, Acts of 1909, being all of a piece, chapter 10 having been passed likewise on February 4, 1909, and chapters 13 and 14 on February 5th, but chapter 10 by its terms not taking effect until January 1, 1910. So that when chapter 10 went into effect, no license could be issued for

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any purpose, and nothing in the form of intoxicating liquors could be sold, except alcohol 188 proof, and that only for the purposes mentioned in the act itself. Perhaps, however, considering Acts of 1899, ch. 161, in connection with the act of 1885, construed in the *Druggist Cases*, 85 Tenn., 449, 457, 3 S. W., 490, druggists may yet sell wine for sacramental purposes without any license other than a druggist's license.

However, the majority of the court are of the opinion that chapters 13 and 14 of the Acts of 1909 were not intended as a general withdrawal of the power to issue licenses except for sale of intoxicating liquors as a beverage, and that a license may still be issued, under which the holders may sell intoxicating liquors for medical, mechanical, chemical, scientific, and sacramental purposes, and for these purposes only. The majority are of the opinion that alcohol of 188 proof, referred to in chapter 10, Acts of 1909, is an intoxicating liquor (*Marks v. State*, 159 Ala., 71, 83, 48 South., 864, 133 Am. St. Rep., 20, and cases cited), included within the classes just mentioned, and not exclusive thereof.

Now, did chapter 10 have any reasonable tendency towards making effective the prohibition laws referred to? Or, to state the question differently, would breweries and distilleries operating in this State, producing thousands of gallons of beer and whisky and brandy every year, make it easier for those desiring to violate the prohibition laws to find the means of accomplishing that result? If these factories stopped, would it be more difficult and more expensive for persons desiring such

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beverages for sale to obtain them? There is only one possible answer to these questions, and that is so obvious that it is unnecessary to state it in terms. If it be true, then, that the producing of so much intoxicating liquor in the State would make it more difficult to maintain the prohibition laws, and the ceasing of the manufacture would tend to make it easier to maintain these laws, then there was ample ground for the classification. Moreover, it is a matter of judicial knowledge on the part of the court, arising out of the history of this class of litigation in the State, that the breweries actively encourage and foster the opening and maintaining of saloons to enable them to sell their product, and that distilleries have places where the product is stored for the convenience of the market.

The conclusion as to the reasonableness of the act is not lessened in force by the construction placed on the acts by the majority of the court, to the effect that licenses may still be issued for the sale of intoxicating liquors for nonbeverage purposes, because it would still be true that the suppression of the home manufacture of such liquors would make it easier to maintain the prohibition laws.

But it is said the classification is arbitrary, because the statute excepts the manufacture of alcohol of 188 proof and forbids the manufacture of all other kinds of intoxicating liquors. It is not arbitrary or unreasonable, because alcohol of the high proof mentioned could be made potable only by dilution with water, and then could not have the palatable qualities of commercial

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whisky, brandy, wine, or beer, and hence would have far less tendency to impair the operation of the prohibition laws. Again, there is nothing in the record to indicate that the machinery which manufactures whisky and brandy, and even beer, would not be efficacious likewise for the making of alcohol 188 proof, and there would be no discrimination against the manufacture as such, but only as to grades of the product. If there would be such discrimination against the manufacturers themselves, if there is anything in the point, the burden would be upon defendant to show it, and it has not been shown.

It is said that defendant, as the manufacturer of a product suitable for medical, mechanical, chemical, and scientific purposes, stands in the position of any other manufacturer producing a lawful product, and that a law which permits other manufacturers to produce their lawful product, and forbids him to produce his lawful product, is arbitrary and unreasonable. This would be a sound view, we think, if there was a discrimination between manufacturers of the same product. But there is no such discrimination. No one is permitted to manufacture in this State whisky, brandy, wine, ale, beer, or other intoxicating drink for sale, except alcohol 188 proof, and all are permitted to manufacture that. Of course, the argument could not be made, nor was it intended to be made, that, because there was no restriction upon the manufacture of cotton goods, or agricultural implements, therefore there could be none on the manufacture of intoxicating liquors. This latter has

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been the subject of special police regulation for a long period of time.

It is said there is a discrimination in favor of the manufacturers of other States, because they are permitted to sell their product in this State for medical purposes, when the local manufacturer cannot. Stated differently, the point is that the druggist, say in this State, desiring to sell for medical purposes, may purchase the goods in other States and bring them here. Therefore it is unjust, unreasonable, and arbitrary to forbid the local manufacturer to make the liquor and sell to the druggist. This argument overlooks the cardinal point, already mentioned, that the local manufacturer could easily make vastly more than would be required for such purposes, and the means of detection would be extremely difficult, and the watching would be expensive, and with every safeguard it would be impossible to prevent his selling in such a way as to impair the prohibition laws; while the foreign manufacturer is far away, the local druggists are few in number and widely scattered that could afford to pay the large license fee to sell the small amount of goods they could sell for medical and other nonbeverage purposes, and under federal law every gallon could be noted and known as shipped in by express or freight, because the package would have to be marked with name and contents. In addition, the State has no power to prohibit importations from other States or countries. That is regulated wholly by federal law. No discrimination can be rightly

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charged on the ground that the State fails to act on a matter as to which it has no power.

It is said that "it is not within the police power of the legislative department of the State government to declare the doing of a lawful act, with the intent of doing another lawful act, a crime," by which it is meant to say that, inasmuch as it is lawful to sell, in this State, intoxicating liquors; such as whisky, brandy, wine, beer, and ale, for medical and other nonbeverage purposes, it cannot be otherwise than unconstitutional for the legislature to forbid the manufacture of these liquors for sale. The conclusion by no means follows. With the same reason it might be said that, inasmuch as it is lawful in this State to sell liquors to buyers in a foreign State, it would be unconstitutional to forbid its manufacture here; but in *Kidd v. Pearson*, 128 U. S., 19-22, 9 Sup. Ct., 6, 32 L. Ed., 346, this precise point was held contrary to plaintiff in error's contention.

Moreover, the legislature has all the power that the people themselves have—that is, complete legislative power—except in the particulars in which that power is restrained by the constitution of the State or of the United States. Whoever would deny the power of the legislature to pass any act on the ground of constitutional restrictions must be able to put his finger on the clause in the constitution which creates the restriction (*Demoville v. Davidson County*, 87 Tenn., 214, 10 S. W., 353; *Stratton Claimants v. Morris Claimants*, 89 Tenn., 497, 15 S. W., 87, 12 L. R. A., 70), or from which there is such necessary implication (*The Redistricting Cases*,

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111 Tenn., 234, 291, 80 S. W., 750). There is no such provision. Grant that whisky, brandy, and the like are useful liquors for medical and other nonbeverage purposes. It is also true that the evil which flows from their use as a beverage overwhelmingly outweighs the good service they perform as medical and other nonbeverage agents. And although their deleterious effects are so widespread and so well known, it has been found almost impossible for the governing agencies of the State to restrain their unlawful use. Without doubt the presence of a distillery or a brewery in a city or community would in every instance make it more difficult for the authorities to maintain the State's prohibition laws, while the absence of such a business would make it correspondingly easier. Indeed, we believe it practically impossible to sustain these laws without the abolition of the breweries and distilleries. Now, the argument is that the State cannot constitutionally use this great aid to the maintenance of its policy because it is lawful to sell the small amount of whisky and brandy needed for medical and other nonbeverage purposes. This argument does not consider the wants of the people to be served, because it is conceded, and cannot be denied, that all intoxicating liquors needed for such purpose can be readily procured abroad, to say nothing of the reservation in the act as to the manufacture of alcohol 188 proof, which we must treat as being adapted to the purpose, since no evidence is adduced to the contrary. The objection, then, is based, and can be based, only upon the proposition that the manufacture

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of such goods is a right of property, and that a right of property cannot be destroyed under the police power of the State.

It has been decided in this State that a house may be pulled down and destroyed despite the owner's objection, because it is, from its condition, dangerous to the health and safety of the people. *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep., 173. It is a matter of common experience that walls are ordered thrown down when deemed in an unsafe condition after a fire, and that houses are destroyed to prevent the spread of a conflagration. To this head are also to be referred the laws prohibiting the making or mending of burglars' tools, and authorizing their seizure and destruction, and generally of things specifically designed for the commission of crime; also laws taxing dogs, requiring their registration, or requiring them to wear collars or muzzles, and authorizing their destruction if found running at large in violation of the law; also laws forbidding the carrying of concealed deadly weapons. *Lawton v. Steele*, 152 U. S., 133, 136, 14 Sup. Ct., 499, 38 L. Ed., 385; Black, Const. Law, sec. 155. For the preservation of the public morals, it has been held that the legislature may prohibit the publication, exhibition, or sale of obscene books or pictures; that it may also prohibit the keeping of gaming tables, or other gambling devices, and provide for their seizure and destruction; that it may prohibit dealings on the stock exchange on margins, or the purchase and sale of "options" or "futures;" that it may prohibit lotteries and gift enterprises. Black, Const. Law, sec. 155, pp.

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397, 398. On the same ground, and particularly to prevent fraud, it has been held that the legislature can forbid the sales of stocks of merchandise in bulk, without first making an inventory and giving notice to all creditors. *Neas v. Borches*, 109 Tenn., 398, 71 S. W., 50, 97 Am. St. Rep., 851; *Lemieux v. Young*, 211 U. S., 489, 29 Sup. Ct., 174, 53 L. Ed., 295; *Kidd v. Musselman*, 217 U. S., 461, 30 Sup. Ct., 606, 54 L. Ed., 839. For the preservation of the public health it has been held that the draining of swamp lands may be enforced, a well may be required to be filled up, a rice crop within the limits of a city may be destroyed, animals affected with contagious disease may be excluded from the State, and those within the State may be destroyed, and infected clothing may be burned. Black, Const. Law, 399, 400. Yet it is contended that the property right involved in the manufacture of whisky, brandy, and beer, which affect the public safety more than war, the public health more than pestilence, and the public morals more than any other agency known to man, cannot be destroyed, under the police power.

In *Schmidt v. Indianapolis*, 168 Ind., 631, 80 N. E., 632, 14 L. R. A. (N. S.), 787, 120 Am. St. Rep., 385, it is said: "The evils which attend and inhere in the business of handling and selling intoxicating liquors are universally recognized, and the danger therefrom to the peace and good order of the community everywhere necessitates the exercise of the police power. The theory of the legislation upon this subject is that the business is one which requires restraint because it is harmful to

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society, and the license fee is exacted for the purpose of restraining the business. This necessity for regulation and restriction in the interest of peace and good order, and for the promotion of public morals, as already said, distinguishes the liquor business from useful and harmless occupations. It is well settled that the legislative power to deal with this subject, whether it be to license, regulate, restrain, or prohibit the sale of such liquors, is unlimited. All such restrictive measures, taken either by the State or by virtue of authority delegated to municipalities, are upheld as a proper exercise of the police power."

In *Crowley v. Christensen*, 137 U. S., 86, 90, 91, and 92, 11 Sup. Ct., 13, 15, 34 L. Ed., 620, it is said: "It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions; the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation. There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self abasement, which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Chris-

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tian community, there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils."

The whole body of the criminal law is but a branch of this power. Under this, not only may men, and even women, be restrained of their liberty, because the safety

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of the public requires their incarceration, but for the same reason their lives may be declared forfeit and taken from them. What is there in the manufacture of whisky that is greater than these things?

We are referred, however, to the opinion of certain text-writers, particularly that of Mr. Tiedeman. This writer says, in language which is quoted in the brief: "It is not enough that the thing may become harmful when put to a wrong use. It must be in itself harmful and incapable of a harmless use." We take issue on this statement of the doctrine. It is directly in the teeth of *Powell v. Pennsylvania*, 127 U. S., 678, 8 Sup. Ct., 992, 1257, 32 L. Ed., 253, the oleomargarine case; but, aside from this, it is not sound in principle. Notwithstanding the fact that an article is useful, its harmfulness to the public generally may be so great and widespread, and its distribution so secret and so difficult of control, that the legislature may protect the public by forbidding its manufacture or sale, or both, so as to root out its evil effects altogether. Who is the judge of the matter? The legislature, or the courts? If the courts, then by what shall they be guided? The constitution. But there is nothing in that instrument which by any just implication declares that an article may not be forbidden, if useful for any purpose, although its harmful effects greatly overbalance its good effects. When such an evil is discovered, it is for the legislature to say whether it shall be prohibited, or merely regulated under the exercise of its police power. Let it be granted that the courts have the right to say whether the exer-

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cise of the police power is reasonable or the contrary in a given instance, is not that exercise reasonable when the thing prohibited is of such nature that it cannot be regulated, so as to protect the public from its disastrous effects, and such protection can be secured only by its extirpation? The same writer puts the question whether the legislature has the power to forbid the manufacture of dynamite, and he indicates an opinion that no such power exists, because dynamite is useful in blasting. We do not doubt that it would be in the power of the legislature to actually prohibit the manufacture of that substance. Suppose tens of thousands of men were all over the country with secret bombs in their pockets, carrying death and destruction everywhere, destroying thousands of buildings and countless lives; should any one say that the courts must stay the hand of the legislature in forbidding this manufacture because dynamite is useful in preparing the way for public and other structures, that this comparatively small use should curb the hand of power in its effort to prevent immeasurable ruin? The fallacy of the whole argument is in the assumption that, if an article is useful for any purpose, it cannot be wholly forbidden, no matter how greatly its evil capabilities and actual uses overbalance the good purposes it serves. The legislature is the judge of the times and occasions when public danger threatens, and it is for the courts to apply the test of the constitutional limitations and restrictions, and these must be applied with a careful and discriminating judgment. This writer, however, concedes, at the

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close of section 125 of his work on State and Federal Control of Persons and Property, that there is an almost unbroken array of judicial opinion against his position; but he urges his views notwithstanding, because he deems that they present the sounder basis:

We are referred to section 223 of Freund's Police Power for the statement that the power of the legislature to prohibit the prescription and sale of liquor to be used as a medicine does not exist, and that the exercise of this power would be purely arbitrary, based upon *Sarrls v. Com.*, 83 Ky., 327. The legislation in question does not contain that prohibition, because the proviso permits the sale of alcohol which may be used for medical purposes. However, the weight of authority is against even this proposition, and in favor of total prohibition, as we shall presently show. Other text-writers declare the right of absolute prohibition.

In Black on Intoxicating Liquors, sec. 37, it is said: "It is within the power of a State to absolutely prohibit the manufacture and sale, within its borders, of intoxicating liquors, either by statute or constitutional enactment, and such prohibition is the lawful exercise of its police power, and is not open to objection on constitutional grounds. Such a law, in so far as it prohibits the sale of liquors in existence at the time of its passage, is not an *ex post facto* law, since, if it lessens the value of such liquors, such evil consequence does not make it retroact criminally in such sense as to bring it within the definition of an *ex post facto* law. Neither can it be considered as impairing the obligation of con-

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tracts, though it may affect corporations or others possessing the right, by legislative grant, at the time of its enactment, to manufacture or sell such liquors. And although it may deprive persons of the right to pursue a business previously lawful, and may have the effect of diminishing the value of the property owned by them, and specially adapted to the continuance of the business, it does not, for that reason, amount to deprivation of their property or liberty without due process of law, within the meaning of the constitution. Neither does it violate the privileges or immunities secured to citizens of the United States by the fourteenth amendment. Nor, if confined to persons and property fully within the jurisdiction of the State, is it invalid as a regulation of foreign or interstate commerce." For these various propositions there is a full citation of authorities in the notes attached to the text.

In Black's Constitutional Law (Ed. of 1910), p. 402, it is said:

"That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power is a proposition which has never been doubted. On all the grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. Whatever form, therefore, the regulating or restricting law may assume, if it is not in contravention of some constitutional provision, it is to be sustained as valid on this ground. This has been the de-

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cision in regard to laws totally prohibiting the manufacture and sale of liquors, laws allowing such prohibition to particular parts of the State at their option, laws licensing the traffic in liquors, regulating or prohibiting the sale on certain days or in certain places, or to particular classes of persons, authorizing the search for and seizure of liquors illegally kept for sale, imposing special or punitive taxation upon the business, and laws giving a right of action in damages to persons injured as a consequence of particular sales against the persons making such sales." To sustain the text numerous authorities are cited.

In McGehee's Due Process of Law, p. 346, it is said: "The practice of prostitution, and the manufacture of, or traffic in, intoxicating liquors, may be prohibited or regulated by the State."

In Joyce on Intoxicating Liquors, sec. 83, it is said: "The power of the State in respect to the liquor traffic is not limited to the imposing of conditions or restrictions merely which partake of the character of regulation or control. The legislature may, when in its discretion it deems it advisable, pass laws which are prohibitory in their nature and result, either as to the manufacture or sale of intoxicating liquor, or as to both."

In 23 Cyc., p. 65, it is said: "The several States, in the exercise of their power, and subject to the limitations and restrictions contained in the constitution of the United States or of the particular State, have full authority to enact any and all laws for the suppression of intemperance and minimizing the evils resulting from

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the traffic in intoxicating liquors, whether by totally prohibiting, or by restricting and licensing, the manufacture and sale of such liquors."

In Woollen & Thornton's Law of Intoxicating Liquors, section 93, it is said: "The right of a State to prohibit the manufacture of intoxicating liquor within her boundaries can be no longer questioned under the many decisions of the courts, even of liquor designed for transportation to, and sale in, another State where the traffic in liquor is entirely legitimate. Such a law is valid as to those engaged in the business at the time of its passage, although the effect is to destroy their business and to greatly, if not totally, impair the value of the property used in the manufacture."

The general principle has been clearly recognized in this State. *Webster v. State*, 110 Tenn., 491, 504, 506, 82 S. W., 179; *Kelly v. Connor*, 122 Tenn., 339, 374, 375, 123 S. W., 622, 25 L. R. A. (N. S.), 201.

In *State v. Durcin*, 70 Kan., 1, 78 Pac., 152, 15 L. R. A. (N. S.), 908, the precise question was presented. In that case it was said: "The constitutionality of the law regulating the sale of intoxicating liquor in this State is assailed, and the argument is made that the sale of liquors for medical, mechanical, and scientific purposes is a lawful and virtuous business, necessary for the welfare of the community; that permits to carry on such business must therefore be obtainable as a matter of right; that the statute gives to probate judges an arbitrary and unrestrained authority to refuse permits for

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such purposes; that the vesting of such power in probate judges renders the statute void; and hence that no one can be punished for selling liquors without a permit. The opinion of the supreme court of the United States, in the case of *Mugler v. Kansas*, 123 U. S., 623, 8 Sup. Ct., 273, 31 L. Ed., 205, effectually disposes of this argument. Mr. Justice Harlan there showed, both by reason and upon authority, that the right to manufacture, sell, and use articles of trade is conditioned upon the fact that such conduct does not deleteriously affect the rights of the public; that, if any business becomes prejudicial to the welfare of the community, society has the right to protect itself against such injurious consequences; that the legislature of the State has the right to determine what measures are appropriate or needful for the protection of the public morals, health, and safety, and, unless a statute has no real or substantial relation to these objects, the courts cannot interfere. It is then shown that if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple or defeat the effort to guard the community against the evils attending the excessive use of such liquors, prohibition may follow. So if the manufacture and sale of liquors for medical, mechanical, and scientific purposes merely opens the door to the train of evils following upon the general use of intoxicants, they may be prohibited; and, since they may be prohibited, they may be regulated in the manner prescribed by the statute of this State."

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Still stronger is the case of *Cureton v. State*, 135 Ga., 660, 70 S. E., 332. The syllabus of the case fully expresses the substance of it, and is as follows: "The act approved August 6, 1907 (Acts of 1907, p. 81), commonly known as the 'prohibition law,' is not violative of article 1, section 1, par. 3, of the constitution of this State, which provides that no one shall be deprived of life, liberty, or property, except by due process of law, on the ground that it prohibits the manufacture of alcohol for any and every purpose, including its use for medicinal, scientific, and mechanical purposes, and its use in the arts, as well as other uses than as a beverage. Nor does the act offend this constitutional provision, because of its applicability to a person who owned and operated a distillery at the time of its passage. Nor is such act violative of the fourteenth amendment of the constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws. The act mentioned above does not violate article 1, section 1, par. 2, of the constitution of this State, which declares that protection of person and property is the paramount duty of government, and shall be impartial and complete."

The right of the States of this Union to totally prohibit the manufacture and sale of intoxicating liquors is fully sustained by the following decisions of the su-

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preme court of the United States: *Bartemeyer v. Iowa*, 18 Wall., 129, 21 L. Ed., 929; *Boston Beer Co. v. Massachusetts*, 97 U. S., 25, 24 L. Ed., 989; *Foster v. Kansas*, 112 U. S., 205, 5 Sup. Ct., 8, 97, 28 L. Ed., 629; *Mugler v. Kansas*, 123 U. S., 623, 8 Sup. Ct., 273, 31 L. Ed., 205; *Kidd v. Pearson*, 128 U. S., 1, 9 Sup. Ct., 6, 32 L. Ed., 346; *Powell v. Pennsylvania*, 127 U. S., 678, 8 Sup. Ct., 992, 1257, 32 L. Ed., 253.

In *Boston Beer Co. v. Massachusetts* the court said: "Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a means of police regulation, looking to the preservation of public morals, a State law, prohibiting the manufacture and sale of intoxicating liquors, is not repugnant to any clause of the constitution of the United States, we see nothing in the present case that can afford a sufficient ground for disturbing the decree of the supreme judicial court of Massachusetts."

In *Foster v. Kansas* the court said: "In *Bartemeyer v. Iowa*, 18 Wall., 129, 21 L. Ed., 929, it was decided that a State law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the constitution of the United States. This was reaffirmed in *Beer Co. v. Massachusetts*, 97 U. S., 25, [24 L. Ed., 989], and that question is now no longer open in this court."

In *Mugler v. Kansas* the court went so far as to say that a State might prohibit the manufacture of intoxicating liquors by a person for his own use, if in the judgment of the legislature it was necessary as a police measure.

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In *Kidd v. Pearson* the doctrines laid down in *Mugler v. Kansas* were approved and reaffirmed.

It is objected that what was said by the supreme court in the two cases last mentioned was matter of *dictum*, in so far as it went beyond the exact case before the court, wherein it appeared that the State enactments under consideration did not involve total prohibition, but made an exception in favor of manufacture for medical, mechanical, and scientific uses. Let it be granted; but *dicta* often repeated by that court, and repeated and sanctioned by other courts, as they have been in this State and others, finally become doctrine. In addition, the case of *Powell v. Pennsylvania* directly presented the question of absolute prohibition, and the decision was in favor of that measure. That the substance in question in that case was oleomargarine cannot alter the principle, because it is conceded the article was in itself useful, and not at all hurtful. The reason of the prohibition was the great danger of fraud in its being mistaken for real butter. But no one can imagine a greater field of fraud than there is in the liquor trade. Adulterations are notorious. The subterfuges practiced in the effort to place intoxicating liquors unlawfully and surreptitiously on the market are without number. When full license privileges were granted the traffic in this State, it was impossible to prevent sales to minors, and sales on Sunday, and sales without license. There is nothing which is the subject of so much fraud as the sale of intoxicating liquors. It is sad to say that even physicians have been prosecuted

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for giving fraudulent prescriptions, in order to assist their patrons in obtaining intoxicating liquors unlawfully. See cases cited in notes to sections 508, 510, 513, 824, and 912 of Woollen & Thornton on the Law of Intoxicating Liquors; and as to the frauds of druggists in handling liquors, it is said, in the *Druggist Cases*, 85 Tenn., 458, 3 S. W., 490, that the evasions of the law were frequent and notorious. The authority of *Powell v. Pennsylvania* was recognized in the later case of *Schollenberger v. Pennsylvania*, 171 U. S., 1, 18 Sup. Ct., 757, 43 L. Ed., 49, but held not to apply to the facts of the particular case. It was also recognized in *Capitol City Dairy Co. v. Ohio*, 183 U. S., 238, 22 Sup. Ct., 120, 46 L. Ed., 171. In that case the following reference is made to *Powell v. Pennsylvania*: "In the *Powell Case* a statute absolutely forbidding the manufacture and sale, in the State of Pennsylvania, of oleomargarine, was held valid, because designed to prevent fraud." 183 U. S., 246, 22 Sup. Ct., 123, 46 L. Ed., 171.

The following cases support the principle that a prohibitory statute passed under the police power of the State is not a violation of the provision of the fourteenth amendment, although it is so broad as to include within its scope acts otherwise innocent, but included because of the difficulty of separating the good from the bad, the danger of fraud: *Booth v. Illinois*, 184 U. S., 425, 22 Sup. Ct., 425, 46 L. Ed., 623; *Otis v. Parker*, 187 U. S., 606, 23 Sup. Ct., 168, 47 L. Ed., 323; *Ah Sin v. George Wittman*, 198 U. S., 500, 25 Sup. Ct., 756, 49 L. Ed., 1142. In *Booth v. Illinois* the Illinois act under exam-

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ination contained this provision: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than ten dollars nor more than \$1,000, or confined in the county jail, not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." In disposing of an objection made to this act, the court said: "It is, however, said that the statute of the State, as interpreted by its highest court, is not directed against gambling contracts relating to the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling. The argument then is that the statute directly forbids the citizen from pursuing a calling which in itself involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business properly and honestly conducted may not in itself be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally,

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or ordinarily, or often done, in pursuing that calling, may be toward that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless looking through mere forms and at the substance of the matter they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

In *Otis v. Parker* the provision of the State constitution under examination was as follows: "All contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." In disposing of this matter the court said: "The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the first section of the fourteenth amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind, if it is to be disposed of to advan-

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tage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws. It is true, no doubt, that neither a State legislature nor a State constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals is not conclusive upon the courts. [Authorities.] But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. . . . If the State thinks that an admitted evil cannot be prevented, except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it is a 'clear, unmistakable infringement of rights secured by the fundamental law.' *Booth v. Illinois*, 184 U. S., 425, 429, 22 Sup. Ct., 425, 46 L. Ed., 623. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown

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for all time that such laws did more harm than good. The Sunday laws no doubt would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the fourteenth amendment became law, as indeed they were in some civilized States. . . . There is no doubt that purchases on margin may be, and frequently are, used as a means of gambling for a great gain or a loss of all one has."

In *Ah Sin v. Wittman* the court had under examination an ordinance of the city of San Francisco, the first section of which made it unlawful for any person within the limits of the city and county of San Francisco "to exhibit or expose to view in any barred or barricaded house or room, or in any place built or protected in a manner to make it difficult of access or ingress to police officers," any cards, etc. The second section made it unlawful for any person to visit or resort to any such barred or barricaded house. The plaintiff in error was tried and convicted, and when the case reached the supreme court of the United States he made the point there that the ordinance deprived him of his liberty, without due process of law, in that he was thereby prohibited from visiting innocently and for a lawful purpose the house or room or place mentioned in the ordinance. In

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disposing of the matter the court said: "The suppression of gambling is concededly within the police powers of a State, and legislation prohibiting it, or acts which may tend to or facilitate it, will not be interfered with by the court unless such legislation be a 'clear, unmistakable infringement of rights secured by the fundamental law.' *Booth v. Illinois*, 184 U. S., 425, 429, 22 Sup. Ct., 425, 46 L. Ed., 623; *Otis v. Parker*, 187 U. S., 606, 23 Sup. Ct., 168, 47 L. Ed., 323. As interpreted by the supreme court of the State, the ordinance cannot be so characterized. It is contended that the ordinance makes criminal 'the mere act of innocently visiting such a house or room, where the visitor had no knowledge and nothing whatever to do with the barring or barricading of the premises or the prescribed articles.' It is hence contended by plaintiff in error that 'he is deprived of his liberty without due process of law, in that he is prohibited thereby from visiting, innocently and for a lawful purpose, the house or room or place mentioned in said ordinance.' Granting for argument's sake that one might visit innocently a barred or barricaded house or room where gambling implements are exhibited or exposed to view, and if, as plaintiff in error alleges in his petition, he was convicted notwithstanding he established that he had innocently visited the house mentioned in the charge against him, we are not at liberty to declare the ordinance unconstitutional."

From the foregoing cases, and the principles underlying them, it is apparent that, although it is lawful to sell intoxicating liquors in this State for medical,

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mechanical, and scientific purposes, the manufacture of such articles in this State, although in and of itself not immoral, may be prohibited, because of the great opportunity afforded by the presence of breweries and distilleries for aiding those who purpose and desire to violate the laws prohibiting the sale of intoxicating liquors as a beverage, and the temptation on the part of the breweries and distillers themselves to encourage such violations in order to make profits. A man who manufactures for purposes of sale is likely to manufacture a large quantity. Though he manufacture only for the purpose of selling for medical, mechanical, or scientific uses, the quantity may be so large as to tempt him to sell on the general market, and so interfere with the laws enacted for the prohibition of the liquor traffic. Cutting off the right of manufacture for any purpose of sale tends to prevent the creation of large stocks of liquor, and so tends directly to support the prohibition laws. The same would be true if the State had the right under federal law to prohibit importation; but it has not. This, however, should not prevent it from exercising such power as it can.

In the agreed statement of facts it is set forth that the plaintiff in error manufactured the whisky in question "for the purposes of sale," but not "for purposes of sale as a beverage within the State of Tennessee." This could only mean that he manufactured it for the purpose of selling it abroad, and also for the purpose of selling it in Tennessee for medical, mechanical, and scientific purposes. It has been held that the

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State has the right to forbid the manufacture for sale and exportation to other States or countries. *Kidd v. Pearson*, supra. It is said in the brief that whisky is not contraband in Tennessee, inasmuch as it may be sold for medicinal purposes. Although it is true that whisky as a medicinal liquor, broadly speaking, is not contraband, yet the statute makes any whisky manufactured in Tennessee a contraband article. According to the statute it cannot be manufactured for sale, and therefore, when made, could not be sold. *Kidd v. Pearson*, supra, 128 U. S., pages 19 and 20, 9 Sup. Ct., 6, 32 L. Ed., 346. The constitutional right to enact such a law is, we think, fully supported by what has already been said.

The police power is a necessary one, inhering in every sovereignty, for the preservation of the public safety, the public health, and the public morals. It is of vast and undefined extent, expanding and enlarging in the multiplicity of its activities as exigencies demanding its service arise in the development of our complex civilization. It is a function of government solely within the domain of the legislature to declare when this power shall be brought into operation, for the protection or advancement of the public welfare. It is said that the courts have the right to determine whether such law is reasonable. By this expression, however, it is not meant that they have power to pass upon the act with a view to determining whether it was dictated by a wise or a foolish policy, or whether it will ultimately redound to the public good, or whether it is contrary to natural

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nances being tested, not only by the constitution, but also by the statutes of the State, and by the common law. *Yick Wo v. Hopkins*, supra; *Ward v. Mayor*, 8 Baxt., 228, 35 Am. Rep., 700; *Grills v. Mayor*, 8 Baxt., 247; *Maxwell v. Jonesboro*, 11 Heisk., 257; *Newbern v. McCann*, 105 Tenn., 159, 58 S. W., 114, 50 L. R. A., 476.

Our own cases upon the subject of the police power are in substantial accord with the federal authorities cited. *State v. Mill Co.*, 123 Tenn., 399, 131 S. W., 867; *Kelly v. Connor*, supra; *Malone v. Williams*, 118 Tenn., 390, 103 S. W., 798, 121 Am. St. Rep., 1002; *Morrison v. State*, 116 Tenn., 534, 95 S. W., 494; *Samuelson v. State*, 116 Tenn., 470, 95 S. W., 1012, 115 Am. St. Rep., 805; *Webster v. State*, supra; *Harbison v. Knoxville Iron Co.*, 103 Tenn., 421, 53 S. W. 955, 56 L. R. A., 316, 76 Am. St. Rep., 682; *Dayton v. Barton*, 103 Tenn., 604, 53 S. W., 970; *Leeper v. State*, 103 Tenn., 500, 531, 53 S. W., 962, 48 L. R. A., 167 *et seq.*; *Marr v. Bank of West Tennessee*, 4 Lea, 578, 585.

Our authorities are likewise in accord upon the special subject of classification. *Stratton Claimants v. Morris Claimants*, 89 Tenn., 497, 15 S. W., 87, 12 L. R. A., 70; *Dugger v. Insurance Co.*, 95 Tenn., 245, 32 S. W., 5, 28 L. R. A., 796; *Debardelaben v. State*, 99 Tenn., 649, 42 S. W., 684; *Railroad v. Harris*, 99 Tenn., 684, 43 S. W., 115, 53 L. R. A., 921; *Malone v. Williams*, supra; *Ledgerwood v. Pitts*, 122 Tenn., 570, 125 S. W., 1036; *State v. Railroad*, 124 Tenn., 1, 135 S. W., 773; *State, ex rel., v. Powers*, 124 Tenn., 553, 137 S. W., 1110.

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Finally, it is insisted by plaintiff in error that the legislation in question is unconstitutional, as in violation of article 2, section 30, of the constitution of the State, which reads: "No article manufactured of the produce of this State, shall be taxed otherwise than to pay inspection fees."

There is no question of taxation in this case; but, as we understand it, the contention under this head is that inasmuch as the people of the State, under the section referred to, encouraged its citizens to engage in the business of manufacturing articles from the produce of the State, by freeing such articles from taxation while in the hands of the producer or manufacturer, and as the manufacturers of whisky are among those who were thus encouraged, and who built factories for the distilling of whisky and the brewing of beer, it would now be a violation of that promise to forbid such manufacture; that there was an implied guaranty that when so constructed those factories should be permitted to operate. To this it may be replied: There is nothing in the case before us to indicate that there is a single distillery, or brewery, in this State, that confines itself, in respect of the raw material it uses, to the produce of this State, or even that it uses any such raw material of the produce of the State; nor can the court take judicial notice of such thing, nor has the court any kind of information on the subject. But let it be assumed that there is such a distillery or brewery; it could not be held with any show

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of reason, as we think, that the State, by the granting of a tax exemption, surrendered its police powers, the ultimate means of self-preservation.

We are of the opinion that none of the errors are well taken, that all should be overruled, and the judgment of the trial court affirmed.

GREEN, J., dissented for reasons submitted, but not filed for publication.

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ANTHONY M. BRADY v. WILLIAM J. OLIVER,
and
WILLIAM J. OLIVER v. ANTHONY M. BRADY.

(*Nashville*. December Term, 1911.)

1. **CONTRACTS.** Announced intention not to perform may be treated as a breach; suit at once.

Where one party to a contract announces in advance his intention not to perform it, the other party thereto may treat the contract as broken, and sue at once for the breach, without waiting for the time fixed for performance. (*Post*, pp. 611, 612, 615.)

Cases cited and approved: *Roehm v. Horst*, 178 U. S., 1; *O'Neill v. Supreme Council*, 70 N. J. Law, 410; *Hochster v. De La Tour*, 2 El. & Bl., 678.

2. **SAME.** Same. Breach by voluntarily rendering performance a legal impossibility; suit at once, when.

Where one party to a contract voluntarily disables himself from performing his part of the contract, by voluntarily making performance, on his part, a legal impossibility because of his assumption of other obligations or relations wholly inconsistent with the performance, or by preventing the performance through his unauthorized act, the other party may sue at once for the breach, in the absence of any stipulation in the contract to the contrary. (*Post*, pp. 612-614.)

Cases cited and approved: *Mining Co. v. Humble*, 153 U. S., 540; *Wolf v. Marsh*, 54 Cal., 228; *Shaffner v. Killian*, 7 Ill. App., 620; *Insurance Co. v. Insurance Co.*, 157 N. Y., 633; *Stark v. Duval*, 7 Okl., 213; *Lumber Co. v. Logging Co.*, 120 Ala., 558; *Lockport v. Shields*, 87 Ill. App., 150; *O'Neill v. Supreme Council*, 1 Ann. Cas., 422, and note, and citations.

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3. **SAME.** Right of rescission for default of other party in abandoning contract; no such intention in this case.

Before one party to a contract can rescind it for the default of the other party, the default must be of such character as indicates an intention upon the part of the defaulter to abandon the contract. In this case, there was no intention to abandon the contract or property. (*Post*, pp. 614, 615.)

Cases cited and approved: *Freeth v. Burr*, L. R., 9 C. P., 208; *Railroad v. Richards*, 152 Ill., 59, 30 L. R. A., 33, and note.

4. **SAME.** What disability or inability will justify the other party in abandoning the contract.

The disability arising from one's disabling of himself to perform the contract within the time limit need not necessarily be such as prevents the discharge of every obligation of the contract; but the inability to perform the contract in respect to matters which would render the performance of the rest of a thing different in substance from the thing contracted to be done will justify the party not in default in abandoning the contract. (*Post*, pp. 615, 616.)

5. **SAME.** Time is not the essence of working contracts; damages for delay is only remedy.

As a general rule, time is not of the essence of working contracts, and where the contractor fails to perform his work within the specified time, he is liable in damages only for the delay. (*Post*, p. 616.)

6. **SAME.** Same. Failure to complete work within time does not terminate contract; injured party may terminate it after time expires.

Where time is not the essence of a working contract, the failure of the contractor to complete the work within the time specified does not, of itself, terminate the contract; but it may be terminated after the expiration of the time, at the election of the injured party. (*Post*, p. 616.)

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7. **SAME.** No rescission of building contract in anticipation of nonperformance within time, when.

Where a building contractor was actively engaged in the performance of the work with a large equipment of men, machines, animals, and things, under a contract which made time the essence of the contract, and a material part of it, but was unable to complete the work within the time specified in the contract, though he would be able to perform it by an extension of the time limit, and there was no defalcation in the grade and quality of the work performed, the owner was not justified, at a remote period from the time limit, in rescinding or annulling the contract, in anticipation of a failure of the contractor to complete the work within the time specified. (*Post*, pp. 615-617.)

8. **SAME.** Rescission for other party's total or legal disability, actual default, or unequivocal renunciation, when.

To justify a rescission or annulment of a contract by one party, there must be, upon the part of the other party, an actual default, unequivocal renunciation, or total or legal disability to perform it, and such disability cannot be anticipated; but after it occurs, the nonperformance may be anticipated; yet the disability must be so complete as to place it beyond the power of the defaulting party to perform his obligations in every material respect, so that the thing that could be accomplished would be essentially different from that contracted and promised. The disability must exist at the time of the renunciation as a legally accomplished fact, and not as a mere potentiality. (*Post*, pp. 617, 618.)

9. **SAME.** Forfeiture clause will not be enforced against contractor upon owner's wrongful rescission of building contract, when.

The provision in a building contract that the work should be begun before a designated date and prosecuted with proper speed, so as to complete the work before a designated future date, and that, on the refusal of the contractor to supply a sufficiency of materials and workmen to insure completion

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within the time specified, the owner might provide, at the contractor's expense, materials and workmen to proceed with and finish the work, and that, in case of a default of the contractor to proceed promptly and complete the work, the owner might cancel the contract and relet the work, or otherwise prosecute it, and, in case of such annulment, all moneys due the contractor should be forfeited to the owner without releasing the contractor from liability, will be given their proper force and effect; but the forfeiture clause inflicting severe and drastic penalties for nonperformance will be strictly construed against the owner, and the contractor's mere delay in the progress of the work will not justify the owner's rescission or annulment of the contract so as to visit upon the contractor a forfeiture of compensation and damages for such annulment. (*Post*, pp. 617-620.)

10. SAME. Termination, without right, is a breach.

Where the owner, without the right to do so, terminates a building contract during the progress of the work, it necessarily follows that he thereby breaches it. (*Post*, pp. 610, 611, 620.)

11. SAME. Legal right to abandon or renounce contract, submitting to legal consequences.

Either party to a contract has the legal right to abandon or renounce it at his will, submitting to the legal consequences thereof. (*Post*, pp. 620, 621.)

Case cited and approved: *Ault v. Dustin*, 100 Tenn., 383.

12. SAME. Measure of damages for breach is compensation, when. The measure of damages for the breach of a contract, by its nonperformance, is actual compensation in all instances where the nature of the case admits of the rule. (*Post*, p. 621.)

Case cited and approved: *Railroad v. Gulnan*, 11 Lea, 103.

13. SAME. Same. Value of breached contract is difference between price and value.

Generally the value of a contract breached by its nonperformance is the difference between the price agreed to be paid for

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its performance and the cost of performance to the other party.
(*Post*, pp. 621, 623.)

Case cited and approved: Singleton v. Wilson, 85 Tenn., 344.

14. **SAME.** Same. Same. Measure of damages for contractor's breach of a building contract is the difference between agreed price and cost of performance.

Where the contractor abandons a building contract, he must compensate the owner for the damages sustained, which is the difference between the agreed price and the cost of performance. (*Post*, p. 621.)

15. **SAME.** Remedies of contractor for owner's termination or rescission of a building contract.

Where the owner, having employed a contractor to perform specific work, wrongfully orders him to vacate the premises and to desist in the further performance of the contract; the contractor may treat the contract as rescinded, and recover damages upon a *quantum meruit*, so far as he has performed it; or he may keep the contract alive for the benefit of both parties, being himself at all times ready and able to perform the contract, and, at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as terminating the contract for all purposes of performance, and sue for the profits which he would have realized if he had not been prevented from performing it. (*Post*, pp. 621, 622.)

Cases cited and approved: Wright v. Haskell, 45 Me., 489; Miller v. Thompson, 22 Ark., 258; Railroad v. Richards, 152 Ill., 59.

16. **SAME.** Rescission entitles injured party to restoration of status quo; repudiator cannot claim benefit.

As a general proposition, neither party to a contract can rescind it without restoring the *status quo*; and one cannot repudiate the contract, and refuse to perform his part of it, and at the same time claim the benefit he has derived from it; and in a

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court of equity, in all matters of rescission, and in all relief akin to rescission, the parties will invariably be placed in *statu quo*. (*Post*, p 622.)

Cases cited and approved: *Hill v. Harriman*, 95 Tenn., 305 (and citations); *Curtis v. Brannon*, 98 Tenn., 161.

17. **SAME.** Same. Owner's wrongful termination of building contract treated as a rescission by the contractor entitles contractor to recovery for expenditures in performance, when.

Where the owner, having employed a contractor to construct a power house, lock and dam, and core wall, wrongfully ordered the contractor to vacate the premises and to cease further work, at a time when he was, in good faith, actively engaged in the due and proper performance, with a large equipment of men, machines, animals, and things, the contractor can recover compensation for the outlay of labor and money expended on the property and the necessary expenditures in preparing for performing the contract, upon merely showing that, in good faith, he was in the due performance of his part, without showing that he could have performed the contract within the time specified. Such suit is not upon the contract, nor for the value of the contract, nor for profits, nor for damages for its breach, but for the outlay of labor and money and expenditures of the contractor in his effort to perform it prior to its rescission by the owner's wrongful termination thereof, which the contractor treated as a rescission. (*Post*, pp. 622-625.)

Cases cited and approved: *United States v. Behan*, 110 U. S., 338; *Cederberger v. Robison*, 100 Cal., 93; *Manufacturing Co. v. Manufacturing Co. (C. C.)*, 39 Fed., 440; *McElwee v. B. L. & I. Co.*, 4 C. C. A., 525, 54 Fed., 627; *Griffith v. Blackwater, B. & L. Co.*, 55 W. Va., 604; *Worthington v. Gwin*, 119 Ala., 44.

18. **SAME.** Brief statement of expenditures testified to, in the absence of opposing testimony, is not too vague and indefinite for recovery, when.

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Upon the issue of what were a contractor's expenditures in his effort of performance which he was entitled to recover from the owner, upon the owner's wrongful termination and breach of a construction contract, which was treated by the contractor as a rescission, a statement compiled by the contractor's bookkeeper from his books, giving unitemized amounts for plant, materials, supplies, and labor, and for "other expenses not included in above," stating amount of such other expenses testified to by him, while very brief, is not too vague and indefinite to support a finding of the facts so testified to by him, there being no opposing evidence. (*Post*, pp. 625, 626.)

19. **SAME.** Interest on damages from institution of suit for owner's wrongful termination of construction contract, treated as a rescission by the contractor.

Where a contractor, unlawfully prevented from completing the performance of the work by the owner's wrongful termination of the construction contract, treated by the contractor as a rescission, sued the owner for his outlay of labor, money, and expenditures in his preparation for performance and in the performance until stopped by the owner's such wrongful act, he was entitled to recover the same as damages, together with interest from the institution of suit therefor, but not from the date of said wrongful termination of the contract. (*Post*, p. 626.)

FROM MARION.

Appeal from the Chancery Court of Marion County.—
T. M. McCONNELL, Chancellor.

LANCASTER & WILLIAMS, SPEARS & LYNCH, and COLEMAN & FRIERSON, for Brady.

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LINDSAY, YOUNG & SMITH, T. A. WRIGHT, and PRITCHARD & SIZER, for Oliver.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This is a bill and a cross bill. The main purpose of the original bill is to recover damages against the defendant, Oliver, for the alleged breach of a building contract entered into between the parties, by the terms of which Oliver contracted to construct a power house, a lock and dam, and a core wall extending from the power house on the east bank of the Tennessee river back to the face of the mountain at Hale's bar. The complainant alleges his damages to amount to \$1,750,000. The defendant filed his answer as a cross bill, by which he sought to recover from Brady, for an alleged breach upon the part of Brady of the same contract, the sum of \$800,000. The chancellor decreed in favor of Oliver in the sum of \$430,529.58. From this decree, Brady prayed a broad appeal, and has assigned errors. Oliver has filed the record for a writ of error, and has assigned two errors thereon.

The main work provided for by the contract consisted of the foundations for a power house, 180 feet long and sixty feet wide on the east bank of the Tennessee river, and extending out into the river; a lock on the west bank of the river, with one concrete wall 630 feet long against the bank, and another 550 feet long, leaving a

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space of sixty feet between, the walls, the walls to be thirty feet thick at the bottom, and twenty-five feet at the top, and twenty-five or twenty-six feet high; a concrete dam 1200 feet across the river, and connecting the power house and lock; and a concrete core wall on the land, extending from the power house back to the face of the mountain, a distance of 785 feet.

The original contract was signed between the parties October 19, 1905. It required that the power house work be completed by February 19, 1907, and the entire work by October 19, 1907. Sections 6, 7, and 8 of the original contract are as follows:

“6. It is also agreed that work under this contract shall be begun before October 26, 1905, and shall be prosecuted with such speed, and at such number of points, and with such machinery and force of men, animals and appliances and things as will insure the full completion of all work embraced in this contract not later than the 19th day of October, 1907, and that all the work shall be completed on or before that day.

“The various works are to be begun and prosecuted at such points and at such different portions of the works as shall be directed and approved by the engineer, who shall have power to prescribe the order and approve the manner of executing the same.

“7. Should, at any time during the progress of said work, the said contractor refuse or neglect to supply a sufficiency of materials or workmen to insure, in the opinion of the engineer, its completion within the time specified, or should he suspend work (except through

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a stress of weather), on any working day, the said principal shall have the power and is hereby authorized, on giving three days' written notice, to provide, at the expense of the contractor, materials and workmen to proceed with and finish the said work (and such expense shall be deducted from the amount retained under this contract by the said principal), and if the amount retained be sufficient to pay such expense, said contractor shall remain liable for any deficiency: Provided, however, that should the said contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the principal, or of the said engineer, or by the abandonment of the work by the employees (commonly known as a strike or strikes) of the contractor, through no fault of the contractor, then the time herein fixed for the completion of the said work shall be extended for a period equivalent to the time so lost by reason of any or all of the causes specified; but no such allowance shall be made unless claim therefor be presented in writing to the said engineer within twenty-four hours of the commencement of such delay or delays. The duration of such extension or extensions shall be certified to by the engineer, but appeal from his decision may be made to arbitration in the manner as herein provided.

"8. And it is also furthermore agreed between the parties hereto that, in case of a default on the part of the contractor to promptly and properly proceed with and complete the work, said principal reserves the right and option to annul and cancel this agreement and to relet

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the work, or any part thereof, or otherwise prosecute it, and said contractor shall not be entitled to any claim for damages on account of such annulment, nor shall such annulment affect the right of said principal to recover damages which may arise from such failure on the part of said contractor to fulfill the terms of this agreement. And in case of such annulment all moneys due said contractor, or retained under the terms of this agreement, shall be forfeited to said principal; but such forfeiture shall, however, not release such contractor from the fulfillment of this contract, but he and his sureties shall compensate the principal for any and all loss and damage which may result from such default. Said contractor shall be credited with the amount of the moneys so forfeited toward any greater sum that he may become liable for to said principal on account of the default of said contractor."

The defendant, Oliver, entered upon the performance of this contract soon after its execution. In a short time thereafter controversies arose between the parties concerning a number of material matters, and especially the contention of Oliver that the conditions under which the work was to be done were materially misrepresented in the drawings and specifications, which were made a part of the contract. This controversy was waged for some time, during which progress upon the work seems to have been slow and unsatisfactory to Brady. On the 30th of April, 1907, the parties entered into a supplemental contract, by the terms of which all of the preceding disputes were settled, or a basis of settlement

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was agreed upon, and further time was given Oliver in which to complete the work. This contract provided as follows:

"It has been and is hereby mutually agreed between the said principal and the said contractor:

"(1) That the claim for compensation for work and material in the slopes, and in excavating for the core wall, and for damages claimed as the result of alleged delay of work in the excavation of said core wall, alleged to be caused by the engineer of said Brady, which is asserted by the contractor to be additional work and damages for which he is entitled to extra compensation, be referred to Engineer Bogart for decision, with the privilege reserved to either party to have arbitration, if demanded and as in the contract provided, after his decision.

"(2) It is further agreed that the engineer shall divide the cofferdam into four or more sections, and shall apportion to each section its due proportion of the contract price, and give to the contractor separate estimates on each section. The first estimate of any section shall be due when the section is completed and the excavation made as designated by the contract, and other estimates when and as prescribed in the contract.

"(3) That a superintendent fully competent and experienced in the class of work covered by the contract shall be forthwith placed and at all times kept in full charge thereof by said contractor at his expense, and who shall be selected by the said contractor with and after the approval of the said Engineer Bogart. Said

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superintendent shall have full authority from said contractor to push the said contract to completion, the time for which is hereby extended for twenty months from the date hereof; and it is agreed that this agreement is not to take effect and be binding until said superintendent has been agreed upon and employed in accordance with the provisions of this section.

“Said contractor is to furnish and employ all available help, animals, equipment and machinery, and supplies and all things, which will as directed by and in the opinion of Engineer Bogart be necessary to obtain said completion within such time, and shall at all times supply and keep supplied the funds necessary for all such requirements.

“(4) That the power house shall at once be progressed, and the work and material necessary to its completion at once be furnished, and that the same shall be fully completed within one year from the date hereof, and that the provision in this contract for longer time shall not apply to such power house construction.”

After the execution of the supplemental contract, Mr. Bogart, the engineer of Mr. Brady, recommended a superintendent of the work to Mr. Oliver, who took charge and continued until, it seems, he voluntarily withdrew. Oliver selected his successor, and referred this appointment to Bogart, who approved it. The work continued until December 6, 1907, and on that day the complainant, Brady, served notice upon Oliver, which, after reciting the contracts above referred to, stated:

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"Because of your default to promptly proceed with and complete the work, I hereby, as provided in paragraph 8 of said original contract, avail myself of the option to, and do hereby, annul and cancel the said contracts between us for said work, and hereby notify you that said contracts are annulled and canceled, and that I will, as promptly as I am able to do so, relet the work or otherwise prosecute it, as I may deem best, holding you and your bondsmen . . . liable for all damages I may sustain by reason of your aforesaid breach of said contracts.

"You are further notified to remove from the premises, within twenty days from this date, your plant and equipment, in order that I may not be delayed in putting on my own forces and equipment for the prompt prosecution of the work.

"Yours very truly,

"ANTHONY N. BRADY,

"By ANDREW HAMILTON, His Attorney."

And upon the same day, he received the following letter from Bogart:

"Chattanooga, Tennessee, December 6, 1907.

"Mr. William J. Oliver, Knoxville, Tennessee.

"Dear Sir: Mr. A. N. Brady having notified you that he has annulled and canceled the contracts for the lock and dam, etc., between himself and you, I beg to say that if you care to make any proposition to turn over the equipment which you now have on the grounds, and in connection therewith, I shall be pleased to present the same to Mr. Brady, and consult with you both regarding the same. If you do not care to make such a propo-

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sition, or if no such negotiations are agreeable to you, and none are brought to a conclusion within the next five days for a transfer by you of your said equipment and adjustment of all matters, in my judgment twenty days will be ample time within which to remove all your equipment on the premises, which are subject to the uses of Mr. Brady and his principals, so that a clear field will be open for installing an equipment and the forces necessary to speedily complete the work.

"I am now in Chattanooga, and if you promptly advise me, by wire or otherwise; I will remain for a few days to receive any proposition you may make looking towards such an adjustment.

Yours very truly,

"JOHN BOGART.

"Address Read House."

The contract stipulated that Oliver should do all work preparatory to its performance at his own expense. In pursuance of this stipulation he had expended large sums in building concrete mixers, houses for laborers, a railroad, and divers and sundry things necessary to the performance of the work. After the notice to remove his equipment from the premises within twenty days, the parties agreed to refer the matter in controversy to arbitration, and before the arbitration should be made upon the other matters in dispute it was agreed that the value of Oliver's plant, equipment, tools, supplies, etc., should be determined, and that Brady should have the option for thirty days to purchase the plant and equipment at the appraised valuation, and, if Brady did not

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exercise this option, the arbitration agreement was to be of no effect. The arbitrators were selected, one by each of the parties, and these two selected a third. A majority of the arbitrators reported that the value of the plant equipment, supplies, etc., belonging to Oliver and upon the premises, was \$250,729.79. Brady declined to avail himself of the option to purchase the plant at the price fixed by the arbitrators, and the arbitration came to an end. Two days later the original bill in this case was filed, seeking to recover damages for the alleged breach of contract, as well as possession of the premises on which the lock and the dam were being built, and to remove the plant and equipment belonging to defendant therefrom. Upon this bill the chancellor made an order directing the defendant to commence to remove his entire plant from the premises within about seven days from the date of the order. The impracticability of removing the equipment placed upon the premises by the defendant within the time designated in the order of the chancellor, as well as the twenty days designated in the notice of the complainant, being quite apparent, the parties came to an agreement as to the value of the equipment, and Oliver sold to the complainant, Brady, for the use of the parties to whom he had relet the work. The price agreed upon was \$130,000.

It should be observed that at the date the complainant assumed to annul the contract, December 6, 1907, the time for performance of its provisions by defendant had not expired. He was allowed twelve months from April 30, 1907, in which to do the power house work, and

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twenty months in which to complete the other work. Nothing else appearing, *prima facie* the complainant, Brady, breached the contract when he terminated it and ordered the defendant to vacate the premises. The theory of the complainant, which, it is claimed, justified him in terminating the contract, and which entitles him to recover of the defendant the damages claimed for its breach by him, is that the work was in such condition on the day that it was terminated that it had become impossible for the defendant to complete the power house within the time limit, April 30, 1908, and the entire work by December 30, 1908, as required by the contract; second, that it would have cost the defendant largely more to perform the contract than the total price at which he had contracted to do the entire work, and therefore the annulment of the contract by the complainant, even if wrongful, resulted in no damage to the defendant.

Many cases can be found which support the doctrine that, where one party to a contract announces in advance his intention not to perform, the other party may treat the contract as broken, and sue at once for the breach, without waiting the arrival of the time fixed by the contract for performance. *O'Neill v. Supreme Council*, 70 N. J. Law, 410, 57 Atl., 463, 1 Ann. Cas., 422; *Hochster v. De La Tour*, 2 El. & Bl., 678, 75 E. C. L., 678; *Hochster v. De La Tour* is often cited by American courts as a leading authority to sustain this doctrine, and in that case Mr. Justice Crompton said:

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“When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word ‘rescind’ implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: ‘Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time (meaning, of course, for purposes of further performance); but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.’ This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal.”

The same rule has been announced by the supreme court of the United States in *Roehm v. Horst*, 178 U. S., 1, 20 Sup. Ct., 780, 44 L. Ed., 953, and many authorities there cited; 7 Am. & Eng. Ency. of Law, 150.

It is equally well settled that, if one party to a contract voluntarily disables himself from performing his part of the contract, the other party has an immediate right of action for the breach. *Wolf v. Marsh*, 54 Cal., 228; *Shaffner v. Killian*, 7 Ill. App., 620; *Union Insurance Co. v. Central Ins. Co.*, 157 N. Y., 633, 52 N. E., 671, 44 L. R. A., 227; *Stark v. Duval*, 7 Okl., 213, 54 Pac., 453. The common case of a party disabling himself from the performance of his part of the contract which confers upon the other party an immediate right of

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action is where the disability is total and goes to the whole contract. In such case there is but little difficulty in determining the rights of the parties, as, if a man who has promised to marry a woman on a certain day marries another woman before that day, the impossibility of the performance of the contract between them is indisputably established by the fact of his marriage; or where one, who has contracted to execute a lease on a future day for a certain term, before that day executes a lease to another for the same term. In cases of this character, the performance of the contract is made a legal impossibility by the assumption upon the part of the defaulting party of obligations with respect to the subject-matter of the contract that are wholly inconsistent with the performance.

A third case, in which a breach of the contract may be anticipated by the injured party, is where the other party by his unauthorized act prevents performance. *Anville Mining Co. v. Humble*, 153 U. S., 540, 14 Sup. Ct., 876, 38 L. Ed., 814; *Wagner Lumber Co. v. Sutherland Logging Co.*, 120 Ala., 558, 24 South., 949; *Lockport v. Shields*, 87 Ill. App., 150. And see authorities cited in the note to *O'Neill v. Supreme Council*, supra.

Aside from any stipulation in the contract of the parties respecting the right of rescission for an anticipatory breach of the contract, we are not aware of any instances which authorize a rescission in anticipation of a breach other than those that may be ranged within the principles of the cases set out above. The insistence here is that the defendant, Oliver, had disabled himself

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from performing his part of the contract. By this it is evidently meant that he had disabled himself from performing his part of the contract within the stipulated time. As we understand the record, there is no contention that he had disabled himself from doing the work of the grade and character, as well as quantity and quality, stipulated by the contract, if there were sufficient extensions of the time limit. But it is claimed that, although the defendant had performed a substantial part of the work contracted for and was actively engaged in the further performance of his obligations under the contract, nevertheless the complainant was of opinion on December 6, 1907, that the defendant did not have sufficient time left within the contract limit to complete the work, and that this deficiency in time limit arose out of the defendant's lack of diligence in prosecuting the work. From this it is concluded that the defendant had disabled himself from the performance of a material part of the contract, which authorized the complainant to rescind.

Before a party to the contract can assume the right to rescind for the default of the other party, the default must be of such character as indicates an intent upon the part of the defaulter to abandon the contract. Lord Coleridge, in *Freeth v. Burr*, L. R., 9 C. P., 208, states the rule thus:

"In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intima-

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tion of an intention to abandon and altogether refuse performance of the contract. I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated, *viz.*, that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

See *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill., 59, 38 N. E., 773, 30 L. R. A., 33, and the very full annotator's note

Upon the facts of this case, it cannot be assumed that the defendant had intended to abandon the property. He was actively engaged in the performance of the work with a large equipment of men, machines, animals, and things before and at the time the complainant annulled the contract. There is nothing in the record from which the complainant could be justified in believing that the defendant had any such intention, and, indeed, as we understand the insistence of the complainant, the default claimed is that the defendant had disabled himself to perform the contract within the time limit agreed upon. This disability need not necessarily be such as prevents the discharge of every obligation of the contract. But the inability to perform the contract in respect of matters which would render the performance of the rest a thing different in substance of the thing contracted to be done will justify the party not in default in abandoning the contract. Assuming that the

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defendant could not complete the work within the time, is this such a disability as works a destruction of the contract, and authorizes the complainant to declare it at an end in anticipation of the breach in the absence of proof of special damages on account of the delay? As a general rule time is not of the essence of working contracts, and where the contractor fails to perform his work within the specified time he is liable in damages only for the delay. 6 Cyc., 67. And the failure to complete the work within the time does not *ipso facto* terminate the contract. It may be terminated after the expiration of the time at the election of the injured party.

While it is clear that time is of the essence of this contract, and is a material part of it, we do not hold that the complainant can anticipate a failure to perform within the time at so remote a period from the time of performance as in this case, and annul the contract, charging the defendant with a disability to perform it. Conceding for the purpose of the point, that it was impossible for the defendant to do the work within the time, this cannot be said to be a total disability to perform the contract, nor such a disability as that, if the contract is performed under it, it would be something other and different from the thing contemplated by the parties. Certainly the defendant was able to perform the contract by an extension of the time limit. There was no defalcation in the grade and quality of the work. The defendant was entitled to a *pro tanto* performance for the full time limit as long as he com-

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plied with the specifications of the contract in the performance, in order to reduce his liability for the breach. Had he failed to complete the contract within the time, he would have been liable for such damages as complainant would have sustained because of the default, and likewise he was entitled to the benefit of all the money he could have earned under it within the time. The complainant was not justified in doing anything that would increase the liability of the defendant, notwithstanding an immaterial breach. See authorities, *supra*. In all of the cases which we have seen, where the injured party has anticipated a breach and claimed a default justifying an abandonment of the contract, the disability to perform has been total, or the defendant has renounced the contract and refused to proceed under it. But those are quite different cases to this. The defendant not only had not renounced the contract and had not refused to proceed under it, but was actively engaged in its performance. But merely because complainant had reason to believe that defendant would breach his contract, he was not justified in rescinding it in anticipation of the breach. In order to justify rescission, there must be actual default, unequivocal renunciation, or legal disability to perform. The disability cannot be anticipated; but, after it occurs, the nonperformance may be. The disability must be so complete as to place it beyond the power of the defaulting party to perform his obligations in every material respect, so that, if the things contracted for are done in the best way the disabled party can do them, the contract, so performed, will be

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essentially another and different thing. It must exist at the time of the renunciation as a legally accomplished fact, and not as a mere potentiality. Therefore it must clearly appear, not only that defendant could not do the work within the time, but that his failure in respect of this matter would be so material as to make his performance essentially different from his promise. If he should default in one day, or one week, or one month of the time, this would not necessarily justify a rescission. It would depend upon the effect of the delay upon the essential objects to be accomplished by the performance. A case can be conceived where a default of one day might defeat the whole purpose of the contract. But generally such is not true of working contracts. No such case is made here. There is no suggestion of special damages to be suffered by complainant from delay; and hence, if default be assumed, it is not shown to be of such essential character as to be without the contemplation of the contract.

What we have said before has been with reference to the law of contracts as administered by courts of equity, and without regard to the stipulation of the parties with respect to their remedies upon the default of either. It is insisted by complainant that under clause 8 the defendant had defaulted "to promptly and properly proceed with and complete the work." This clause was construed by him to justify a termination of the contract for a default in promptly and properly proceeding with the work. It is conceded, of course, that the defendant was under no obligation to have the work completed.

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on the 6th of December, 1907, because under the terms of the contract he had more than three months in which to complete the power house construction and more than twelve months in which to complete the balance. It is well settled that provisions in working contracts like clauses 6, 7, and 8 of the one under consideration will be given their proper force and effect by the courts. It is equally well settled that clauses like 8, inflicting severe and drastic penalties for nonperformance, are not favored by the courts, and are to be strictly construed. 30 Am. & Eng. Enc. of Law, *supra*. Clause 7 of the contract provides a remedy for the owner in case of a failure upon the part of the contractor to sufficiently progress the work, and whether there has been default in its progress is left to the opinion of the complainant's engineer. The remedy there provided is for an increase of the force at the expense of the contractor. That remedy, of course, contemplates speeding the work before the expiration of the time limit. The remedy provided in section 8 is the right to annul and cancel the contract, and to relet the work, or otherwise prosecute it. It provides a forfeiture upon the part of the contractor of all claims for damages for the annulment, without depriving the complainant of his right to damages against the contractor for any default of his. Likewise all moneys due the contractor, or retained under the contract are to be forfeited to complainant. But this forfeiture does not release the contractor from the fulfillment of the contract, but he and his sureties are still liable to the complainant for all loss and damage

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which may have resulted from the default. It is true that the contractor is to be credited with the amount of the moneys so forfeited, provided the complainant is entitled to a greater sum on account of the contractor's default. A mere statement of the provisions of this clause of the contract is convincing that the parties did not contemplate that its severe penalties were to be visited upon the contractor for a default in progressing the work. This is true, not only because the parties most likely would not have assented to terms of such extreme severity, but because of the language of the contract itself. It is expressly declared that such forfeiture shall "not release such contractor from the fulfillment of this contract." This could not be true, if the complainant has the power to anticipate a breach of the contract by the defendant, and annul it, and then visit upon him the forfeiture provided for. So we are of opinion that neither under clause 8, nor the general law governing contracts, was the complainant justified in arbitrarily annulling the agreement before the expiration of the time limit.

Having concluded that the complainant was not authorized to terminate the contract at the time he did, it necessarily follows that he breached it in so doing. We do not understand that this is controverted; but it is claimed that, if the contract was wrongfully terminated by the complainants, defendant is without remedy, for the reason that it would have cost him more to complete it than he could have earned under it. It is quite true that either party to a contract has the

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legal right to abandon or renounce it at his will, submitting to the legal consequences thereof. *Ault v. Dustin*, 100 Tenn., 383, 45 S. W., 981. And that the measure of damages is actual compensation in all instances where the nature of the case admits of the rule. *Railroad v. Guinam*, 11 Lea, 103, 47 Am. Rep., 279. And generally the value of the contract is the difference between the price agreed to be paid and the cost of performance to the complainant. *Singleton v. Wilson*, 85 Tenn., 344, 2 S. W., 801. But in the foregoing class of cases the court was speaking of the measure of damages for a default in performing the contract. Naturally, where one sues upon the contract, claiming rights under it, the measure of his recovery is the value of the contract itself. Such, however, is not this case. When the complainant wrongfully ordered the defendant to vacate the premises and desist in further performing the contract, he renounced the contract and left it to the option of the defendant to treat it as rescinded. *Wright v. Haskell*, 45 Me., 489; *Miller v. Thompson*, 22 Ark., 258. In *Lake Shore & M. S. R. Co. v. Richards*, supra, the rule is clearly stated thus:

“It is well settled that where one party repudiates the contract, and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies. He may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and, at the end of the time specified

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in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to such recovery the plaintiff must allege and prove performance upon his part, or a legal excuse for nonperformance."

As a general proposition, neither party to a contract can rescind without restoring the *status quo*. He cannot repudiate the terms of the contract, and refuse to perform his part of it, and at the same time claim the benefits which he has derived from it. In a court of equity, in all matters of rescission, and in all relief akin to rescission, the parties will invariably be placed in *statu quo*. *Curtis v. Brannon*, 98 Tenn., 161, 38 S. W., 1073, 69 L. R. A., 760; *Hill v. Harriman*, 95 Tenn., 305, 32 S. W., 202, and the authorities there cited.

The only recovery sought by cross-complainant is for moneys expended in work preparatory to the performance of the contract and the moneys actually earned in the performance. The complainant, Brady, has received the full benefit of all the moneys expended by the defendant, Oliver, and there is no rule of law by which he can retain these benefits without compensation. The chancellor did not award profits, and none are claimed

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here. Of course, before profits could be recovered, the cross-complainant would have to show full performance upon his part, or else that he stands ready to perform. But claiming, as he does, nothing more than compensation for the outlay of labor and money expended upon the property, he is not required to show that he did or could perform the contract. It is only necessary to show that in good faith he was in the due and proper performance of his part of the contract when it was wrongfully terminated by the complainant. In this view, it is not necessary to determine whether he could have performed the contract within the time. The contract may be considered as rescinded by mutual consent. When the complainant abandoned it, the defendant accepted the rescission, and now demands, and only demands, that the complainant restore the *status quo* as far as possible. That he is entitled to this is beyond controversy upon all of the cases. The real distinction between the cases which might seem to hold a contrary view lies in the fact that in those cases the suit was upon the contract. In that event the measure of damages is the value of the contract; but in this case the contract is terminated by the conduct of the parties, and the cross bill seeks to recover, not the value of the contract nor damages for its breach, but the outlay of the cross-complainant in his effort to perform it prior to the rescission. Mr. Sutherland states the rule under discussion thus:

“A contractor whose performance of his contract has been illegally stopped may recover for work necessarily

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done or expense necessarily incurred in preparation for its performance, although he could not have recovered for it if there had been a full performance. If the contractor has derived any benefit from such work or expense, its value must be deducted from the cost thereof. This right of recovery is distinct from the right to recover profits. When those are recovered, the former is included." 3 Sutherland on Damages, par. 713, pp. 2182, 2183.

The text is supported by many adjudicated cases, some of which are: *Cederberg v. Robison*, 100 Cal., 93, 34 Pac., 510; *Taylor Mfg. Co. v. Hatcher Mfg. Co.* (C. C.), 39 Fed., 440, 3 L. R. A., 587; *McElwee v B. L. & I. Co.*, 54 Fed., 627, 4 C. C. A., 525; *Griffith v. Blackwater, B. & L. Co.*, 55 W. Va., 604, 48 S. E., 442, 69 L. R. A., 124; *Worthington v. Gwin*, 119 Ala., 44, 24 South., 739, 43 L. R. A., 382; *United States v. Behan*, 110 U. S., 338, 4 Sup. Ct., 81, 28 L. Ed., 168. In the case last cited it was said: "Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. . . .

"The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured

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party has not been damaged to the extent of his actual loss and outlay fairly incurred."

As heretofore stated, the chancellor decreed a recovery in favor of the cross-complaint to "compensate him in the amount expended by him in good faith and in the exercise of reasonable judgment in preparing to perform and in actual performance of the contract. And it appearing from the evidence, and not being controverted or disputed, that the total expenditures of the said Oliver in preparing for and in carrying on and performing said contract amounted to the sum of \$673,974.86, and there being no evidence that any part of said expenditures were unreasonable or improper, and it further appearing that the total of the amounts paid to said Oliver on account of the work done by him under said contract and the amounts realized by him for the sale of his plant, equipment, machinery, etc., which he had accumulated for the performance of said contract, is the sum of \$243,445.28, it is adjudged that the difference between said amounts, being the sum of \$430,529.58, is the amount to which said Oliver is entitled as damages aforesaid." In this court in brief of counsel it is said: "Incidentally we might remark that, even if the decree was based upon the correct principles, there was no sufficient evidence, from which to determine what defendant's proper and reasonable expenditures were. All we have is a five-line statement made from defendant's books, purporting to give the cost of plant, materials, supplies, and labor, and concluding with the vague

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statement, 'Other expenses not included in above, \$75,963.03.'"

It is true that the statement in the testimony of the defendant's bookkeeper is very brief, but it is not true that the statement is vague or indefinite. Nothing appearing to the contrary, the testimony of this witness is sufficient to establish the facts testified to by him. The result of the foregoing is that all of the complainant's assignments of error are overruled.

The cross-complainant has filed the record for writ of error, and has assigned as error that the chancellor should have decreed in favor of him in the sum of \$435,526.88, instead of \$430,529.58. We think this assignment should be sustained. The witness upon whose testimony the decree of the chancellor is based as to the amount of the cross-complainant's expenditures, and the amount which he has been paid, shows that the difference between these two amounts is the former sum, instead of the sum decreed by the chancellor.

It is also assigned as error that the chancellor should have allowed interest upon the sum decreed the cross-complainant from the date of the cancellation of the contract, December 6, 1907. This assignment is not well taken to the full extent claimed by it. Interest should have been allowed from the date of the filing of the cross-bill. With the modifications herein indicated, the decree of the chancellor is affirmed.

Drake v. Railroad.

BESSIE DRAKE *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS
RAILWAY COMPANY *et al.*

(*Nashville.* December Term, 1911.)

1. **COMMON CARRIERS.** First connecting carrier owes a contract duty to shipper not to divert shipment from route, when.

Where the first connecting carrier received a car load of freight, under the initial carrier's contract for transportation over several specific lines, procured by the solicitation of such first connecting carrier's traveling freight agent and shipped in its car, such connecting carrier owed a contract duty to the shipper not to divert the car to another line without his consent. (*Post*, pp. 633-635, 637.)

2. **SAME.** Initial carrier participating in first connecting carrier's unauthorized diversion is equally liable with it for loss of freight.

Where a car load of fruit trees was routed over several connecting lines under a contract of shipment, and there was a diversion by the second carrier owing a contract duty to the shipper not to divert the car, the initial carrier participating in such diversion, as well as such second carrier, is liable, to the shipper for the loss of the freight. (*Post*, pp. 635-637.)

Cases cited and approved: Railroad v. Campbell, 7 Heisk., 261; Railroad v. Odil, 96 Tenn., 63.

3. **SAME.** Railroad as third party receiving freight under unauthorized diversion thereof, without sufficient shipping instructions, is liable for loss, when.

Where a car load of fruit trees was routed over specified railroad lines under a contract of shipment, another railroad not specified in the routing, which received the shipment under an unauthorized diversion thereof by the second carrier, is liable to the shipper for a loss following the diversion, where it received the car without sufficient shipping instructions, though

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it had no knowledge of the shipper and no knowledge of the terms of the bill of lading under which the shipment was made. (*Post*, pp. 638, 639, 645.)

4. **SAME.** Carrier is not bound to receive freight from any except owner, or his agent; liability for receiving without knowledge or instructions.

A common carrier is not bound to accept for transportation goods from any person other than the owner, or his duly authorized agent; and it is negligence, on its part, for a carrier to receive freight from another carrier, without knowledge of its shipping contract and its authority to offer the freight for transportation. (*Post*, pp. 639, 640.)

5. **SAME.** Initial carrier under contract of interstate shipment is liable for full loss by negligence of a connecting carrier, notwithstanding contractual limitation against liability exceeding a stipulated sum.

Under the act of congress of February the 4, 1887, ch. 104, sec. 20, 24 Stat., 379, as amended by the Carmack amendment of June the 29, 1906, ch. 3591, 34 Stat., 584, 595, making the initial carrier of an interstate shipment liable for any negligence of the connecting carrier, etc., the initial carrier, under a contract for shipment of a car load of fruit trees, over specified railroad lines, to a point in another State, is liable to the shipper for the entire loss of the freight following an unauthorized diversion of the shipment from the specific route by the second carrier, though the contract purported and undertook to limit its liability to an inadequate agreed valuation. (*Post*, pp. 630-633, 640-643.)

Cases cited and approved: *Railroad v. Gilbert*, 88 Tenn., 480; *Railroad v. Sowell*, 90 Tenn., 17; *Deming v. Cotton Press Co.*, 90 Tenn., 327; *Railroad v. Stone*, 112 Tenn., 348; *Railroad v. Smith*, 123 Tenn., 678; *Railroad v. Mills*, 219 U. S., 186.

6. **SAME.** If second specified carrier refuses to forward freight, initial carrier shall ask for instructions, and, if not given, return the freight.

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Where the second carrier, under a contract of shipment over several specified lines, refuses to carry the freight over its specified line, it is the initial carrier's duty to receive the freight back into its possession, and to call upon the shipper for further instructions, in the absence of which, the freight should be returned. (*Post*, p. 643.)

7. **SAME.** Notice of claim for loss known to the carrier is wholly unreasonable and unnecessary, though stipulated for.

A shipper of a car load of fruit trees is not precluded from recovering for a loss of the freight following a diversion from the route specified by the contract of shipment by his failure to make a written claim to the carrier's agent at the point of destination within thirty days after the arrival of the shipment, as required by the contract, where the shipment was wholly valueless when it reached its destination, and was burned in the station yards, with the knowledge of the agent of the last carrier; for such notice would be wholly unreasonable. (*Post*, pp. 643-645.)

8. **SAME.** Joint and several liability of the first two carriers diverting a shipment and of a third carrier receiving the diverted shipment, without sufficient shipping instructions.

Where a shipment of fruit trees was, under a contract of through shipment, routed over specified connecting lines, and was, without authority, diverted by the first two carriers to a line not included in the contract, and that line received the shipment, without sufficient shipping instructions, the three carriers are jointly and severally liable for a loss of the shipment following the diversion. (*Post*, pp. 630-633, 645.)

FROM FRANKLIN.

Appeal from the Chancery Court of Franklin County.
—T. M. McCONNELL, Chancellor.

Drake v. Railroad.

ESTILL & LITTLETON and ARTHUR CROWNOVER, for complainant.

GEO. E. BANKS and J. W. BONNER, for defendant Illinois Central Railroad Co.

WRIGHT & WRIGHT, for defendant Chicago, Rock Island & Pacific Railway Co.

LYNCH & PHILLIPS and CLAUDE WALLER, for defendant Nashville, Chattanooga & St. Louis Railway Co.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

Miss Drake filed her original bill against the railroad company above named, which the bill avers was incorporated under the laws of the State of Tennessee, and also against the Chicago, Rock Island & Pacific Railway Company and the Illinois Central Railroad Company, each of which, the bill avers, is a corporation under the laws of the State of Illinois.

The bill is predicated upon the total loss of a car load of fruit trees valued at \$1,125, owned by complainant and shipped by her from Winchester, Tennessee, under a bill of lading which named Toppenish, in the State of Washington, as the ultimate point of the shipment.

Of the three defendants, the Tennessee corporation was the initial carrier, and issued the bill of lading.

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The Chicago, Rock Island & Pacific Railway Company was the common carrier to which, under the terms of the bill of lading, the car was to be delivered at Memphis, Tennessee, by the initial carrier, and under the terms of the bill of lading, the Chicago, Rock Island & Pacific Railway Company was to carry the car over its line to El Paso, Texas, and there deliver it to the Southern Pacific Railroad Company, by which company it was to be carried to Portland, Oregon, and there to be delivered to the Northern Pacific, and thence to be carried by that company to its destination at Topenish, in the State of Washington.

The car in which the fruit trees were shipped was owned by the Chicago, Rock Island & Pacific Railway Company, and upon its arrival at Memphis, Tennessee, this car was delivered by the initial carrier to the Chicago, Rock Island & Pacific Railway Company; but that company, after having the car in its possession, refused to carry it over its line as routed in the bill of lading, and, acting in conjunction with the initial carrier, delivered the car at Memphis, Tennessee, to the defendant the Illinois Central Railroad Company, without any further instructions to the latter company than that the car was by the latter company to be transported to the terminus of its line in the city of New Orleans, in the State of Louisiana. The Illinois Central Railroad Company received the car from its codefendants, without instructions from either of them, and without instructions from the shipper, and transported it to the terminus of its line at New Orleans, and there placed upon the car

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a card marked "Hold," and thereafter made delivery of the car at New Orleans to the Southern Pacific Railroad Company.

The act of diverting of the shipment the bill makes the basis of the liability of each of the defendants. Her loss is alleged to have been caused by that act.

Defendants answered, and, on final hearing, decree was rendered in favor of complainant against the initial carrier for \$754.80, and against each of the other defendants separately for the sum of \$1,404.08. As against each of the defendants, except the initial carrier, the decree found the value of the property lost, together with interest thereon, to amount to the sum above stated, for which decree was rendered against each of them; but, as against the initial carrier, it was decreed that it was not liable for the full value of the property lost, as shown by the proof, for the reason that complainant, by her contract, embodied in the bill of lading, agreed that the property should be valued, in case of loss or damage, at three dollars per hundredweight, so that the recovery of the complainant against the initial carrier was based upon the weight of the cargo as shown by the bill of lading, multiplied by the agreed valuation per hundredweight.

From all of this decree each of the defendants prayed an appeal, which was granted, and the complainant has filed the record in this cause for writ of error in this court, on account of the failure of the decree to allow her the full value of her property lost, as against the initial carrier. The complainant has assigned the fore-

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going as the only error in the decree. The defendants have each assigned errors.

Why the Chicago, Rock Island & Pacific Railway Company refused to carry the shipment as routed by the bill of lading, after the shipment had been solicited by one of its traveling agents, and after assurance by the shipper of her willingness to pay any increased freight made necessary by that routing; why the initial carrier and the Chicago, Rock Island & Pacific Railway Company, co-operating, diverted the shipment from the routing for which the car had been prepared, with full knowledge that the shipment was perishable, and without the consent of the shipper, and without advising her of their purpose; why they did not give to the Illinois Central Railroad Company full shipping directions, so that the car would proceed without delay; why the Illinois Central Railroad Company accepted the car without full shipping directions, and why, having so accepted it, such directions were not promptly secured by it; and when, if at all, it ever secured such directions; and when, if at all, it ever countermanded its order to the Southern Pacific Railroad Company to "hold" the car; and when the car left New Orleans over the Southern Pacific, are questions unanswered in this record.

On each of the outsides of the car in which the shipment was contained were cardboards on which in large letters were printed the words, "Fast Freight; Perishable; No Delay; Hurry," and also on each side of the car were the hurry tags, which the Nashville, Chatta-

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nooga & St. Louis Railway Company, according to the proof, attaches to perishable shipments.

From the facts proven, we think that the proximate cause of complainant's loss was the joint and concurrent act of each of the defendant corporations in diverting the shipment from the routing agreed on by the bill of lading, without her consent or knowledge, and the joint negligence of each and all of them in their failure to see that the Illinois Central Railroad Company had sufficiently definite instructions for the forwarding of the shipment to its destination, with reasonable promptness, and their joint negligence in failing to furnish to the Southern Pacific Railroad Company, with reasonable promptness, sufficient shipping instructions to enable it to forward the shipment to its destination. Their separate participation in the act of diversion was necessary to its accomplishment. By the active agency of each of them it was accomplished. The initial carrier and the Chicago, Rock Island & Pacific Railway Company, we think, at the time of diverting this shipment each stood in the relation of party to the contract of shipment. The initial carrier issued it, and in it named the Chicago, Rock Island & Pacific Railway Company as the second in the line of carriers who were to handle the shipment. At the time the shipment was diverted, it was in the hands of the second carrier at the solicitation of its traveling freight agent. The act of this agent the second carrier does not dispute, nor does it dispute his agency by any proof; therefore we think, by its receipt of the car into its possession and the other facts

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mentioned, it owed a contract duty to the complainant not to divert the shipment without her consent.

The legal status of the first and second carrier toward the complainant, the shipper, being thus fixed, what were the respective rights and duties of the parties to each other? Our own cases answer the question thus:

"It is insisted in the assignment of errors that, under the facts in this case, an emergency had arisen which justified a deviation in route, inasmuch as the one chosen by the shipper was closed by a strike, and the other, equally good, was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands it, a deviation from the route agreed upon with the shipper may be made, and will be justifiable, as, for instance, forwarding perishable freight by rail, when a storm prevents a boat from proceeding upon its voyage. But where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route, without notice to and instructions from him. Ray on Freight Carriers, sec. 18; Hutchinson on Carriers, sec 14. See, also, *Railroad v. Campbell*, 7 Heisk., 261. Unless justified by urgent circumstances, a deviation by the carrier will render it responsible for losses resulting, even from inevitable casualties, and the original carrier becomes, in effect, an insurer for the line he selects. Ray on Freight Carriers, sec. 79; Hutchinson on Carriers, sec. 314." *Railroad v. Odil*, 96 Tenn. (12 Pick.), 63, 33 S. W., 611.

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When the second carrier named in the bill of lading refused to transport the shipment as routed by that contract, it was the duty of the initial carrier to advise the shipper of the fact; and, in case she refused to give further shipping instructions, it was the right of the initial carrier to return the shipment to her at her expense, and thus, being wholly without fault, it could have avoided all liability to her. No emergency existed which justified the initial carrier in diverting the shipment from its routing without the shipper's consent; therefore when the initial carrier diverted the shipment it became liable to the shipper as an insurer of the safety of the goods, because, having assumed, without her consent, to select a different agency from that which she had selected for the transportation of her goods, the agency which is so selected became its agency, and not hers, and it was responsible to her in law for the acts of its agent.

The second carrier is on this record wholly without excuse or justification for refusing and failing to transport the shipment over its line, as the same was routed. By way of defense, it sets up in its answer that the rates did not apply by the route selected; but there is no proof that such was the fact, and, if such was the fact, no reason is shown why it should not have accepted shipper's offer to be responsible for and pay additional freight necessitated by the route selected.

"The carrier cannot violate a contract, and at the same time claim the benefit of such contract; and, whether it is the initial carrier, or an intermediate carrier, it may become liable for the loss of the goods, or

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injury thereto by its succeeding carrier, where in the absence of an emergency, and without any necessity, it has deviated from the route prescribed by its contract or instructions, and forwarded the goods over another route or in another manner." 4 Elliott on Railroads (2 Ed.), sec. 1449a, p. 108.

See, also, the authorities cited in note 51 to sustain the above text.

In the same section, Mr. Elliott observes further:

"But to render the intermediate carrier liable for deviation, or to affect its rights in such a case, it must, as a general rule at least, have notice that a particular route is specified, or of the limitations in the authority of the prior carrier."

The intermediate or second carrier in the present case in its answer in substance denies that it had notice of the particular route specified, or of the limitations in the authority of the prior carrier; but it makes no proof to sustain its answer in this respect, and we think it is clear from the proof in this record that it did have such notice, and it is equally clear from the authorities already cited that, by its co-operation in diverting the shipment to the Illinois Central Railroad Company, that company became the agent of the second carrier, and the second carrier became liable in law to the shipper as an insurer of the goods, because of its liability for the act of the agency, which, without the consent of the shipper, it had selected as an agency for the transportation of her goods.

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The Illinois Central Railroad Company, by way of defense in its answer, set up in substance that at the time it received and undertook the transportation of complainant's goods from Memphis, Tennessee, to New Orleans, and delivery at that point to the Southern Pacific Railroad Company, it did not know who the shipper was, and it had no knowledge of the limitations of the powers of the two common carriers from which it received the shipment, and no knowledge of the terms of the bill of lading, under which the initial carrier received the shipment from complainant, and consequently that it is not liable under the theory of complainant's bill as a joint actor with the other two common carriers for diverting complainant's goods from the routing specified in the bill of lading.

Each of the witnesses introduced by it did testify that they had no such knowledge; but, assuming that the Illinois Central Railroad Company had no such knowledge, when it received the shipment, nevertheless we think it is clear from this record that its acts of negligence in receiving the goods from its codefendant without sufficient shipping instructions, and its instructions to the Southern Pacific Railroad Company at New Orleans to "hold" the car, coupled with its failure to show by any proof when it countermanded the order to "hold" the car, justify the inference, in the absence of any proof to the contrary, that the delay in the arrival of the shipment at its ultimate destination within a reasonable time was the direct result of the negligence of the Illinois Central Railroad Company, and that for

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this reason it is liable in law to complainant for the loss sustained by her by reason of its negligence. It was not one of the carriers named in the bill of lading, and therefore it cannot successfully assert, by way of defense, as against complainant, any limitation by express contract with her of its common law liability as a common carrier, arising out of its act of receiving and undertaking to transort her goods.

It is true that the bill of complaint bases its liability on the ground that it participated in the violation of the routing agreement. It is equally true that its liability flows directly from, and as a consequence of, its violation of that agreement. It was negligence on its part not to know of that agreement before it received the goods. It was within its legal right to insist upon a showing from its codefendants of their authority to offer the goods to it for transportation. A common carrier is not bound to accept for transportation goods from any person other than the owner, or the duly authorized agent of the owner. 1 Hutchinson on Carriers (3d Ed.), sec. 148.

Therefore, the ignorance resulting from its negligence cannot avail this defendant. Upon acceptance of the goods for transportation, although wholly ignorant of who the owner was, it became liable as an insurer of the safe delivery of the goods at the point of ultimate destination; its liability being limited only in case the loss of the goods should result from some one or more of the causes which the common law, for its benefit and pro-

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tection, interposes between it and absolute liability.
1 Hutchinson on Carriers (3d Ed.), sec. 265.

The proof fails to show that the loss of the value of the goods, which is so accepted, resulted from any of the causes which the common law interposes between this defendant and absolute liability as an insurer of the goods.

On the contrary, we think the proof, together with all of the just and legal inferences deducible therefrom, clearly establishes that the loss was the result of the negligence of this defendant and its codefendants.

Reverting, now, to the assignment of error made by complainant, and based on the failure of the decree to award her full damages against the initial carrier, we think this question is fully determined in favor of complainant by the decision of the supreme court of the United States in *Atlantic Coast Line R. R. Co. v. Riverside Mills*, reported in 219 U. S., 186, 31 Sup. Ct., 164, 55 L. Ed., 185, 31 L. R. A. (N. S.), 7, opinion by Mr. Justice Lurton, in which case the opinion of the court was based upon its construction of the provisions of the act of congress regulating commerce between the States, known as the Carmack amendment of June 29, 1906 (Act June 29, 1906, ch. 3591, 34 Stat., 584, 595 [U. S. Comp. St. Supp., 1909, pp. 1149-1166]). The twentieth section of the act of February 4, 1887 (24 Stat., 379, ch. 104 [U. S. Comp. St., 1901, p. 3154]), as changed by the Carmack amendment, read as follows:

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“That any common carrier, railroad, or transportation company, receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.”

“That the common carrier, railroad, or transportation company issuing such receipt or bill of lading, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury, shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owner of such property as may be extended by any receipt, judgment or transcript thereof.”

In the course of the above opinion, construing the Carmack amendment, the court said:

“The shipments involved in the present case were voluntarily received by an initial carrier, who undertook to escape carrier’s liability beyond its own line by a provision limiting liability to loss upon its own line.

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This was forbidden by the Carmack amendment, and any stipulation and condition in the special receipt which contravenes the rule in question is invalid. Reduced to the final result, the congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier's liability throughout the entire route, without right to reimbursement for the loss not due to his own negligence."

And further in its opinion the court in the above case said:

"It is therefore not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although as between themselves the company actually causing the loss may be primarily liable."

We think the case last discussed establishes the proposition that the initial carrier in the present case is liable for the full amount of the loss sustained by complainant, notwithstanding the stipulation in the contract that the carrier assumes liability only to the extent of the agreed valuation of three cents per pound. Moreover, this stipulation in the contract, under the facts of the present case, would amount to no protection to the initial carrier under the holdings of this court in *Railroad v. Gilbert*, 88 Tenn., 430, 12 S. W., 1018; *Railroad v. Sowell*,

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90 Tenn., 17, 15 S. W., 837; *Deming v. Cotton Press Co.*, 90 Tenn., 327, 17 S. W., 89, 13 L. R. A., 518; *Railroad v. Stone*, 112 Tenn., 348, 79 S. W., 1031; *Railroad v. Smith*, 123 Tenn., 678, 134 S. W., 866.

What we have said disposes of all of the defenses set up by the initial carrier. Its first defense, that it made delivery to the connecting carrier, and never received the property into its possession again from the connecting carrier, is met by the answer that it was its duty to receive the property back into its possession, and to call upon the shipper for further instructions, and, in the event of default or refusal of the shipper to give such instructions, it was its right to return the property to the shipper.

The second defense, that an emergency arose which authorized it to divert the shipment, is inconsistent with its first defense. Its second defense is in substance that it did not divert the shipment. But, passing this, our conclusion is that no such emergency had arisen as justified it in diverting the shipment.

Its third defense, that it is not liable because the loss or damage did not occur on its portion of the route, cannot be sustained, because the shipment was an interstate one, and it falls within the operation and effect of the Carmack amendment.

Its fourth defense, that claims for loss and damage must be made in writing to the agent at the point of destination promptly after the arrival of the property, and that delay to make such claim for more than thirty days after delivery of the property, or after due time

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for delivery thereof, relieved it from liability, cannot be sustained, because under the proof in this case the property was wholly valueless when it reached its destination, and was burned in the station yards and within the knowledge of the agent of the last carrier, by whom proof of this fact appears in the record.

To require the shipper to give notice of the loss or damage of the property shipped at the point of destination, when the record shows that the agent had knowledge of such fact immediately upon the arrival of the property, would be wholly unreasonable, and the clause of the contract in this case making such requirement has no effect upon the complainant's right of recovery.

The fifth defense is based on the agreed valuation clause of the contract, and the limitation of liability thereby attempted to be effected. This defense cannot be sustained, for reasons already set out.

The second carrier named in the bill of lading does not rely in its answer upon any of the stipulations of the contract of shipment, but denies that it was a party thereto, and bases its defense only upon its right as a common carrier to refuse to transport the shipment as routed, and, further, upon its denial that it had any part in diverting the shipment from its routing. These defenses, as we have already shown, are not sustained by the proof. The defenses made by the Illinois Central Railroad Company are not consistent. It denies all knowledge of the routing contract, and yet claims the benefit of the limitations of the common-law liability indorsed upon the back of that contract; but, passing

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this inconsistency, the answer to each of its defenses is, in brief, that it was at its peril bound to know the limitations upon the powers of its codefendants when it received the shipment from them, and, second, that it was not one of the carriers named in the bill of lading, and cannot claim the benefit of any of the provisions thereof, looking to the limitation of the common-law liability of a common carrier.

We do not undertake to fix or determine in this opinion anything as to the liability of the defendants to this suit as between themselves; that question not being here involved.

The only question we determine is that each of the three corporate defendants are under joint and several liability to the complainant for the value of her property as fixed by the decree of the chancellor against the Chicago, Rock Island & Pacific Railway Company and its codefendant, the Illinois Central Railroad Company, and in so far as the chancellor's decree failed to award complainant a decree for the same amount against the initial carrier, the Nashville, Chattanooga & St. Louis Railway Company, the decree is modified, so as to award complainant a decree for the correct amount as above indicated.

Except as modified above, the decree of the chancellor is affirmed, with costs.

Railroad v. Price.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY *et al.* v. J. T. PRICE *et ux.*

(*Nashville.* December Term, 1911.)

1. **FINDINGS OF FACT.** Preparation by counsel is improper, when requested to be reduced to writing.

Under the statute (section 4684 of Shannon's Code) requiring circuit judges, upon the request of either party, to reduce their findings of fact to writing, it is improper to permit or require counsel for the successful party to prepare such written findings of fact, because the preparation thereof is a high judicial function that cannot properly be intrusted to counsel naturally so biased with respect to their cases as makes it almost impossible for them to present, fairly and fully, all the facts as the judge would do. (*Post*, pp. 648-650.)

Code cited and construed: Sec. 4684 (S.); sec. 3673 (M. & V.); sec. 2959 (T. & S. and 1858).

Case cited and approved: *Hinton v. Insurance Co.*, 110 Tenn., 130.

2. **SAME.** Reduced to writing by counsel will be disregarded; and, if exception was taken and error assigned, case will be reversed.

Such findings of fact so prepared by counsel will not be treated by the supreme court as the statutory findings of fact, and constitute grounds of reversal, where exception was properly taken; but where no error is assigned for such action, the record will be examined as if no request had been made for such findings. (*Post*, pp. 648-650.)

3. **COMMON CARRIERS.** Sleeping car company is liable in damages for expulsion due to its mistake in routing ticket.

A sleeping car company is liable in damages for its tort in the expulsion of a passenger in breach of its contract, due to its

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delivering to him a sleeping car ticket over a route between two points other than that for which it was sought to be purchased and other than that called for by his railroad ticket, where such railroad ticket was then in the possession of the sleeping car company's agent, and subject to inspection, as the guide for the route of the sleeping car ticket by its agent who, in this case, was the railroad company issuing the railroad ticket. (*Post*, pp. 650-655.)

Cases cited and approved: *O'Rourke v. Railroad*, 103 Tenn., 124; *Railroad v. Graves*, 110 Tenn., 232; *Railroad v. Pauson*, 70 Fed., 585, 17 C. C. A., 287; *Pullman Palace Car Co. v. King*, 99 Fed., 380, 39 C. C. A., 573; *Railroad v. Reynolds*, 55 Ohio St., 370; *Gorman v. Railroad*, 97 Cal., 1; *Banking Co. v. Roberts*, 91 Ga., 513; *Railroad v. Conrad*, 4 Ind. App., 83.

4. SAME. Railroad company is liable in damages for expulsion from sleeping car, due to its mistake as agent in routing sleeping car ticket.

A railroad company is liable in damages for the expulsion of a passenger from a sleeping car, due to its mistake while acting as agent for the sleeping car company, and while operating, in connection with other railroads, a line of through sleepers between two points, in selling him a sleeping car ticket good between those points, but not over the route covered by his railroad ticket. The railroad company's such act as agent was one of misfeasance and negligence rendering it as agent, as well as the principal, liable. (*Post*, pp. 655-657.)

Case cited and approved: *Drake v. Hagan*, 108 Tenn., 265.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* from the

Railroad v. Price.

Court of Civil Appeals to the Supreme Court.—THOS. E. MATTHEWS, Judge.

CLAUDE WALLER and FRANK SLEMONS, for plaintiff in error.

WALTER STOKES, for defendants in error.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought by Z. T. Price and wife, Amelia Price, against the Nashville, Chattanooga & St. Louis Railway Company and the Pullman Palace Car Company, to recover damages for the expulsion of Mrs. Price from a sleeping car at Tifton, Ga., in September, 1907.

The suit was brought before a magistrate. There was a judgment there for \$500 against the railway company, which was affirmed by the circuit court and by the court of civil appeals. The suit was dismissed in the circuit court as to the Pullman Palace Car Company by consent of counsel for the plaintiffs below. A writ of *certiorari* was granted by this court to review the action of the court of civil appeals, and the case has been heard here.

Upon the trial of this case in the circuit court, counsel for the railway company requested the judge to reduce his findings to writing. The judge replied that it was a rule of his court, when requests of this character were made, to require the attorney for the successful party to

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prepare the written finding of facts. In accordance with this demand of the trial judge, there was a written finding of facts prepared by the attorney for plaintiffs below. It was signed by the judge and is put into the record as his finding.

This practice is improper. It is no compliance with the statute (Shannon's Code, section 4684), which requires circuit judges to make these findings of fact in writing upon the request of either party to the suit. Such findings are accorded the highest dignity in the appellate courts of Tennessee. They are looked to as embodying a fair statement of all the essential facts in the record, and this court has said, in *Hinton v. Insurance Co.*, 110 Tenn., 130, 72 S. W., 118, that it will not go outside this finding and examine the record at large for the facts of the case, but will only look to the record to see if the findings of fact are supported by any evidence. There are other cases, familiar to the profession, which further illustrate the weight and force that are here given to these findings of the trial judge.

The preparation of such a finding, being a matter of so much importance and a high judicial function, cannot properly be intrusted to counsel. Counsel have a natural bias with respect to cases in which they are engaged that makes it well-nigh impossible for them to fairly and fully present all the facts as the judge would do. We are of opinion, therefore, that his honor was in error in delegating the preparation of the duty imposed upon him by the statute to counsel in the case, and that the finding in this record cannot be looked to by us and

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treated as a statutory finding of facts by the trial judge. Had exception been taken, the case would have been reversed on this account.

However, no error being assigned to this action of the trial judge, we have examined the record, as if no special finding had been requested, to see if there is evidence to sustain the judgment below. There is really no controversy with reference to the determinative facts of this case.

In the spring of 1907, Mrs. Amelia Price, who was a delicate woman, troubled with asthma and in the habit of spending her winters in the South, purchased, in Jacksonville, Fla., a round-trip ticket to Nashville and return. This ticket was procured from the agent of the Georgia Southern & Florida Railroad Company. It read over that road from Jacksonville to Macon, over the Central of Georgia from Macon to Atlanta, and over the lines of the plaintiff in error from Atlanta to Nashville.

In conformity with a stipulation in this ticket, upon her arrival in Nashville, Mrs. Price deposited the same with the agent of plaintiff in error at the Union station in Nashville, pending her return to Jacksonville, paying a small fee in this connection.

When she was about ready to go back to Florida, in September, 1907, she went to the Union station at Nashville with the intention of buying sleeping car accommodations from Nashville to Jacksonville. She was there told that sleeping car space was sold at the Maxwell House, and the agent at the Union station gave her a slip, or routing, as it was called, purporting to show the

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character of her railroad transportation, and she took this slip to the agent of the plaintiff in error in the Maxwell House, where the city office of the plaintiff in error was maintained. From the latter agent she purchased a berth in a sleeper running through from Nashville to Jacksonville; it being, according to the Pullman check given her, "Lower Berth No. 8, Car No. 1, Nashville to Jacksonville."

On the day after procuring her sleeping car ticket, she returned to the Union station and procured her railroad ticket, and embarked in a sleeper on a train leaving Nashville at 9:30 a. m., known as the "Dixie Flyer." Her tickets were examined by the gateman and others prior to her boarding this sleeper and this train, and she was assigned to the berth called for by her Pullman check.

There is some evidence indicating that she was changed from one sleeper to another later in the same day, probably after she had passed Atlanta and gone off the lines of plaintiff in error. This change is not a material circumstance in the case, if it happened, as there was no car on the Dixie Flyer going from Nashville to Jacksonville over the route indicated by her ticket. At any rate, she appears to have retired that night without interruption, but about 1 o'clock she was awakened, and, upon looking out, saw the Pullman conductor and the railroad conductor by the side of her berth. They informed her that her ticket was not good over the line traversed by the sleeper in which she was located, further than Tifton. They told her that if she

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wished to remain in this sleeper, and go on to Jacksonville, it would be necessary for her to pay four dollars and fifty cents additional fare; that, if she was not willing to pay this additional fare, she would have to get off at Tifton, which place they would reach in about one hour. She decided to get off at Tifton, and did so, remaining for an hour or so, when she caught another train for Jacksonville, and reached there somewhat later than she would have done, had she continued on the train from which she was removed. She was, as said before, a delicate woman, and there is testimony indicating that the exposure and excitement incident to her being removed from the train at Tifton brought on an attack of asthma, which caused her considerable inconvenience and suffering.

The record shows that during the year of 1907, there was a line of through sleepers operating between Nashville and Jacksonville, but that the route of these sleepers was as follows:

From Nashville to Atlanta over the Nashville, Chattanooga & St. Louis Railway.

From Atlanta to Macon over the Central of Georgia Railroad.

From Macon to Tifton over the Georgia Southern & Florida Railroad.

From Tifton to Jacksonville over the Atlantic Coast Line.

The route of these sleepers, it will be seen, was the same as the route of Mrs. Price's ticket, up to Tifton, Ga., but from Tifton to Jacksonville the sleeper went

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over the Atlantic Coast Line, while her ticket read over the Georgia Southern & Florida Railroad. As previously observed, there was no sleeper running all the way from Nashville to Jacksonville over the route corresponding with Mrs. Price's ticket at this time.

From the schedules of these trains, as proven in the record, and from Mrs. Price's testimony that she was awakened about one hour before she left the train at Tifton, it is manifest that she was aroused and removed from the train while on the Georgia Southern & Florida Railroad.

It is clear, from an examination of the record, that the Nashville, Chattanooga & St. Louis Railway was the agent of the Pullman Palace Car Company for the sale of sleeping car space in sleepers going over its lines. Such is the testimony of the superintendent of the Pullman Company at Nashville, and it is borne out by the testimony of the city ticket agent of the plaintiff in error.

Upon the facts stated, we think the Pullman Company was liable to Mrs. Price for her expulsion from this car. It contracted with her that she might occupy lower berth No. 8, in car No. 1, from Nashville to Jacksonville. She was forced to leave the car before reaching Jacksonville, by the sleeping car company, or by those for whose acts it was responsible. The sale to her of this through transportation by the Pullman Company, with the railroad ticket in the possession of its agent and subject to its inspection, was a representation to the passenger that the sleeper in which she was sold a berth

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would go by the same lines that the railroad ticket called for.

Mr. Hutchinson says:

“But if, after inspection of a passenger’s railroad ticket, an agent of the sleeping car company sells the passenger a ticket for a berth on the sleeping car, it is a representation to the passenger that the sleeping car will go by the same line of railroad that the passenger’s ticket calls for. Such representation is in the nature of a warranty, and the contract may therefore be treated as embodying it as a part of its terms. It is plain that this contract is broken if the passenger is compelled by the sleeping car company, or by those for whose acts it is responsible, to leave the car at any time before reaching his destination because his railroad ticket calls for a different line than that over which the sleeping car passes, and in that event he is entitled to recover for the breach of contract, as he could do if he had been wrongfully ejected by a common carrier or by an innkeeper.

“For such ejection, the sleeping car company is liable, not only for the direct, but also for the consequential, damages which should have been anticipated as the natural and probable result of its breach of contract, subject to the limitation that the damages recovered could not be enhanced by the negligent or willful conduct of the passenger.” Hutchinson on Carriers, section 1138.

This passage is founded on *Pullman Palace Car Company v. King*, 99 Fed., 380, 39 C. C. A., 573, from the circuit court of appeals, second circuit, which case is

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well reasoned, and we think reaches a sound conclusion.

The Pullman Company was therefore liable in this case to Mrs. Price for a breach of contract, and we think it was liable in tort also.

The effect of our own cases is that an action in tort lies under such circumstances. *O'Rourke v. Street Railway Co.*, 103 Tenn., 124, 52 S. W., 872, 46 L. R. A., 614, 76 Am. St. Rep., 639; *Railroad v. Graves*, 110 Tenn., 232, 75 S. W., 729, 100 Am. St. Rep., 803. See, also, *Railway Co. v. Reynolds*, 55 Ohio St., 370, 45 N. E., 712, 60 Am. St. Rep., 706; *Railway Co. v. Pauson*, 70 Fed., 585, 17 C. C. A., 287, 30 L. R. A., 730; *Gorman v. Railway Co.*, 97 Cal., 1, 31 Pac., 1112, 33 Am. St. Rep., 157; *Banking Co. v. Roberts*, 91 Ga., 513, 18 S. E., 315.

The expulsion of Mrs. Price was the natural and proximate result of the wrongful act of the agent of the sleeping car company in selling her through transportation in this sleeper, which it knew did not go over the route shown by her railroad ticket. 6 Cyc., 558; *Railroad Co. v. Conrad*, 4 Ind. App., 83, 30 N. E., 406. This wrongful act was the occasion of her expulsion, and for such wrongful act an action in tort can be maintained.

As to the Pullman Palace Car Company, this suit has been dismissed, and it is not before us. The question remains, however, as to the liability of the railway company. The railway company, while acting as an agent of the Pullman Company, and while operating in connection with other roads, a line of through sleepers from Nashville to Jacksonville, with this intending passen-

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ger's ticket in its possession, and before it for inspection, sold to her through accommodation, lower berth No. 8, car No. 1, Nashville to Jacksonville, when it knew there was no sleeper from Nashville to Jacksonville over the lines indicated by her railroad ticket. As a result, the lady was expelled from the sleeper at 2 a. m., just where it might have been foreseen she would be expelled—at the point where the route of her ticket and the route of the sleeper diverged.

May a railroad company, familiar with the route of sleepers, which it operates to attract custom, undertaking either for itself, or as an agent for the sleeping car company, to furnish passengers with through accommodations to distant points, be allowed to escape liability when guilty of negligence such as the foregoing? May its passengers be thus inconvenienced, discommoded, and damaged without redress? We think not, for several reasons.

Under the proof adduced in the case, it is sufficient to say that the railway company was the agent of the Pullman Company, with reference to the sale of sleeping car accommodations. It was clearly such an agent, upon this record. Its acts in this matter, therefore, were those of misfeasance and negligence, for which the agent, as well as the principal, is liable. *Drake v. Hagan*, 108 Tenn., 265, 67 S. W., 470, and cases cited; Clark & Skyles on Agency, vol. 2, section 595; 31 Cyc., 1561, note 57.

Upon this ground there can be no doubt of the liability of the plaintiff in error herein.

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In the view of the case which we have taken, it is manifest that the evidence fully supports the judgment below, and that there is no variance between the averments of the warrant and the proof. Assignments of error to this effect are therefore overruled.

The judgment of the court of civil appeals is affirmed.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* UNITED STATES FIDELITY & GUARANTY COMPANY *et al.*

(*Nashville.* December Term, 1911.)

1. **COMMON CARRIERS.** Shipment to consignor's own order with draft attached with directions to notify purchaser is notice to carrier not to deliver till draft is paid.

A shipment of goods to the shipper's own order, with draft on the purchaser attached to the bill of lading, with directions to the carrier to notify the purchaser, is an unmistakable indication amounting to notification by the shipper to the carrier that the title to the goods will not pass, and that its duty to deliver will not arise, until the draft has been paid and the bill of lading has been taken up and presented to it. (*Post*, pp. 664, 665, 674, 675.)

Cases cited and approved: *Bank v. Cummings*, 89 Tenn., 609; *Charles v. Carter*, 96 Tenn., 607, 615; *Railroad v. Bank*, 123 U. S., 727; *Bank v. Railroad*, 81 Ga., 221; *Stockyards Co. v. Westcott*, 47 Neb., 300; *Weyland v. Railroad*, 75 Iowa, 573; *Railroad v. Bank*, 77 Ark., 482; *Electric Co. v. Railroad*, 72 S. C., 255; *Lyons v. Railroad*, 119 N. Y. Supp., 703; *Lyons v. Railroad*, 136 App. Div., 903, 120 N. Y. Supp., 1133.

2. **SAME.** Same. Delivery of goods without taking up bill of lading to which draft was attached is a conversion, when.

Where a common carrier, without taking up the bill of lading under which the shipment was made to the shipper's own order, with draft on the purchaser attached, with directions to notify the purchaser, delivers the goods to the purchaser, without requiring the prepayment of such draft, it is guilty of a conversion; and the failure of the shipper to recover the goods from the purchaser after such wrongful delivery would not relieve the carrier from liability for conversion. (*Post*, p. 675.)

Cases cited and approved: *Railroad v. Phillips*, 108 Md., 285; *Railroad v. Fay*, 89 Ark., 342.

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- 3. SAME.** Evidence insufficient to show a custom to deliver goods without surrender of bill of lading to which a draft was attached.

In a common carrier's suit against its clerk and the surety on his bond, to recover for his wrongful delivery of goods consigned to the shipper's own order, with draft against the purchaser attached to the bill of lading, made to the purchaser, without requiring the payment of such draft and the surrender of the bill of lading properly indorsed, as required by a rule of the carrier, the evidence is stated, reviewed, and held to be insufficient to show a custom to deliver such shipments to the purchaser without requiring the payment of such draft and surrender of such bill of lading. (*Post*, pp. 664-677.)

- 4. SAME.** To establish waiver of rule for protection, carrier must have knowledge of custom of its receiving agent in violating the rule.

Before it can be properly held that a common carrier has sanctioned a custom to violate its rule that its receiving agents must not deliver goods consigned to shipper's order, with directions to notify the purchaser, except upon the purchaser's surrender of the original bill of lading properly indorsed, it must appear that the habit of violation among the carrier's servants was so constant, open, and general that no reasonable conclusion could be reached other than that the responsible officers of the carrier must have known it; for the knowledge of the adoption of such custom by a subordinate officer must be brought home to the carrier, or there must be such facts in existence in connection therewith as would impute knowledge to the carrier, in order to show its waiver of its said rule. (*Post*, pp. 676, 677.)

- 5. FIDELITY INSURANCE:** "Culpable negligence" of employee, as defined in a fidelity bond and as applied to the facts, is held to be established.

Under a fidelity bond to secure the faithful performance of his duties by a clerk in a railroad freight office, which exempted the insuring bondsman from liability for any loss by mistake,

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accident, or error of judgment on the part of any employee; or by robbery, unless by or with his connivance of "culpable negligence," and defining such negligence to mean the "failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs of the same character," the clerk's delivery of goods consigned to the shipper's order, with draft against the purchaser attached to the bill of lading, made to the purchaser without requiring the surrender of the original bill of lading properly indorsed, in violation of the carrier's rule, was "culpable negligence" within the meaning of the bond. (*Post*, pp. 677-679.)

6. **SAME.** Evidence held to show no violation by insured of provision exempting insuring bondsman from liability.

In an action on a fidelity bond to secure the faithful performance of duty by a clerk in a railroad freight office, exempting the insuring bondsman from liability, if at any time the railroad company suspected or had knowledge of the fact that the clerk was negligent or unworthy of confidence, and did not immediately notify the bonding company, the evidence is stated, reviewed, and held not to show that the railroad company had violated the provision exempting the bonding company. (*Post*, pp. 679-683.)

7. **SAME. Same.** Evidence held to show no violation by insured of provision for use of precautions to detect wrongful acts by insured employee.

In an action on a fidelity bond to secure the faithful performance of duty by clerk in a railroad freight office, the evidence is stated, reviewed, and held not to show a violation by the railroad company of a provision in the bond that it should use all reasonable precautions to detect any act on the part of the clerk which would tend to render the bonding company liable for any loss, by an audit of his books, etc. (*Post*, pp. 683-685.)

8. **SAME. Same. Same.** "Charges" mean "freight charges," and not value of shipment for which draft is attached to bill of lading forwarded through other agencies for collection.

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The inspection report showing that the insured employee permitted freight to be delivered without payment of "charges" does not show a delivery of freight shipped "order—notify," without requiring the surrender of the original bill of lading properly indorsed; for the word "charges," under the rules and inquiries for the inspectors to answer, mean "freight charges," pertaining to the revenue of the railroad company, and not money due for the value of shipments with drafts attached to bills of lading, and sent through other agencies for collection from the purchaser. (*Post*, pp. 680-683.)

9. **ASSIGNMENTS OF ERRORS.** Not waived by failure to urge and press point in briefs and argument; renewed by petition to rehear.

Where, in an action on an indemnity bond, insuring the faithful performance of duties by an employee, and in the penalty of ten thousand dollars, a judgment was rendered by the chancery court against the indemnity company for the penalty of the bond, with interest, and costs, and the appellant (indemnity company) assigned as error that the chancery court erred in adjudging it "liable for \$10,000 and interest and costs for any amount," under which assignment the supreme court could have acted on the matter of interest, the point or question was not waived on the hearing by a failure to urge and press the same in the briefs and argument; and the appellant might bring it to the special attention of the court in the form of a petition to rehear. (*Post*, pp. 687-689.)

10. **INTEREST.** None on penalty of indemnity bond, with collateral conditions, before judgment in lower court.

Under the statute (section 4704 of Shannon's Code) providing that judgment may be entered, upon bonds with collateral conditions, for the stipulated penalty, to be discharged by the payment of the principal, and the interest due thereon, or the damages assessed by the jury, interest cannot properly be allowed on the penalty of a fidelity bond, prior to the judgment in the lower court, where the bond expresses only a maximum amount of liability, dependent upon the breach of duty by the

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employee whose conduct was insured, and the exact amount of liability is measured by the extent of the breach, such bond is one with collateral conditions. (*Post*, pp. 689-690.)

Code cited and construed: Sec. 4704 (S.); sec. 3690 (M. & V.); sec. 2976 (T. & S. and 1858).

Cases cited and approved: *Cherry v. Mann*, Cooke, 268-273; *Overall v. Babson*, 2 Yerg., 71, 72; *State v. Blakemore*, 7 Heisk., 638; *Rhea v. McCorkle*, 11 Heisk., 415, 416; *Fidelity & Guaranty Co. v. Rainey*, 120 Tenn., 357, 377, 405, 506.

Case cited and overruled: *Bank v. Guaranty Co.*, 110 Tenn., 10.

11. FIDELITY INSURANCE. Bonds are treated as insurance contracts as to nature and extent of liability, but they are in form bonds whose penalty cannot be exceeded in judgment.

While bonds guaranteeing the fidelity of employees or agents, executed for a consideration by companies organized for and engaged in that business, are treated by the courts as insurance contracts, when under construction with a view to ascertain the nature and extent of the liability assumed, and such companies are not in that respect entitled to the favorable consideration accorded to gratuitous sureties, still they are nevertheless in form bonds with collateral conditions, limited by a sum expressed therein, called the "penalty," and the judgment cannot exceed the penalty. (*Post*, pp. 690, 691.)

Code cited and construed: Sec. 4704 (S.); sec. 3690 (M. & V.) sec. 2976 (T. & S. and 1858).

12. REHEARINGS. Office of petition to rehear is to call the attention of the court to authorities and matters overlooked, and not to reargue considered points.

A petition for rehearing should never be used for the purpose of rearguing the case on points already considered and determined, unless some new and decisive authority has been discovered, which was overlooked by the court; for the office of a petition to rehear is to call the attention of the court to mat-

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ters overlooked, and not to those things which counsel supposes were improperly decided after full consideration. (*Post*, pp. 691-693.)

Case cited and approved: *Jenkins v. Eldridge*, 3 Story, 299, Fed. Cas. No. 7,267.

FROM DAVIDSON.

Appeal and writ of error from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

P. D. MADDIN and JOHN BELL KEEBLE, for complainant.

C. T. BOYD and E. L. MCNEILLY, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed for the purpose of recovering the sum of about \$12,000 and interest, now amounting in all to about \$20,000, which principal sum the railroad company claims it paid to certain customers of the road to cancel a liability brought upon it by the negligence of one of its employees, T. C. McCampbell, who was chief clerk in complainant's South Nashville office. The Fidelity & Guaranty Company executed to the complainant, for a consideration, a bond to secure the faithful performance by Mr. McCampbell of his

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duties as such clerk. The action was brought against McCampbell for the whole liability, and against the Fidelity & Guaranty Company to the extent of its bond, which was not large enough to cover the whole sum claimed. Judgment was rendered on the bond for \$16,860 and costs, and against T. C. McCampbell for \$19,953.77. The Guaranty Company appealed, and McCampbell brought the case here by writ of error, and both defendants have assigned errors.

It is alleged that through the culpable negligence of Mr. McCampbell certain cars shipped to the order of the consignors, with directions to notify C. D. Smith & Co., were delivered to the latter, without the production of the bills of lading; that these cars contained wheat, and were each of the value of \$600 to \$1,000; that by reason of such delivery without the production of the bills of lading the complainant railroad company became liable to the consignors for the value of the goods contained in the cars, and that C. D. Smith & Co. never made this liability good.

It is admitted by the defendants McCampbell and the Fidelity & Guaranty Company that the cars were delivered, as stated, to C. D. Smith & Co., without the production of the bills of lading; but it is insisted that there was no culpable negligence in making such delivery, because Mr. McCampbell in so delivering the cars acted in accordance with an established custom of the company, and as he was expected to do in the ordinary course of the business. Other defenses claimed will be stated further on as they arise out of the facts.

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It appears from the record that the nature of the shipments referred to was this, *viz.*: Dealers in other cities, who had sold goods to other dealers and to mills here in Nashville and were unwilling to pass the title without previous payment of the purchase price, shipped goods to their own order, with directions in the bills of lading to notify the persons to whom the sales had been made; that these bills of lading were attached to drafts at the points of shipment, and these drafts were placed in bank for collection, and were forwarded through the initial banks to other banks in Nashville, and it was expected that the persons to whom the goods had been shipped would in each instance call at the bank and pay the amount of the draft and take up the bill of lading and present it to the railroad company, and then procure the delivery of the cars. At the same time that the bills of lading were issued in the form above mentioned there was a waybill given to the conductor of the train on which the goods were to be transported, showing that the cars referred to were shipped to order of the consignor, or, as previously stated, that they were bills "order-notify." A waybill to the same effect went to the office of the railroad company at the point of delivery; that is, in the present instance, at Nashville. It was the duty of the agent at Nashville, either personally or through his clerks, to go out into the yard of the railroad company every night and take down the numbers of the cars there found. This duty was performed by the night clerk, who arrived at the yard about five o'clock in the afternoon, and left at seven the next morning. It was

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his duty to enter the numbers of these cars on a ruled sheet, with proper spaces in which to write information concerning the cars, indicated by a heading over these spaces. This was called the "abstract." The night clerk also had access to the conductor's waybills, and from these he would sometimes indicate whether the cars were straight shipments or "order-notify" shipments; but he was not bound to make this indication. The abstract was returned to the office of the agent at the South Nashville office, of which Dr. Bumpas was in charge, and there passed under examination by Mr. McCampbell, the chief clerk. He had before him, not only this abstract, but the waybills, and it was his duty to compare the car numbers with these waybills, from which he would learn whether they were "order-notify" shipments or straight shipments, and would indicate the fact opposite each number. Upon the consignee being notified, it was his privilege to give an order to the office of the agent indicating the point or place where he wished the car delivered. The chief clerk was accustomed then to enter upon the order book the directions so given. He then made out a switching list, which constituted the authority of the yard foreman for delivering the cars therein mentioned to the points therein directed. This switching list also contained the date under which the delivery was directed. There was also another paper, which was made out by the car service association, called the "car service record." The purpose of the existence of the car service association was to facilitate the delivery and unloading of cars and their return into the

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active channels of commerce, and to thereby prevent their being used for storage by consignees. The date being fixed when the delivery was made, and, under the car service record, that on which the car was re-delivered to the railroad company, the time was thus ascertained for which consignees should be charged for retaining the car at the rate of one dollar per day after the lapse of a certain free time not necessary to be mentioned more specifically in this case. There was also kept in the office of Dr. Bumpas, but in no other office on the line of railway, a set of little books known as "bills of lading books." These were used to keep a record of bills of lading surrendered to the railroad company on "order-notify" shipments. These various papers and the books just mentioned are necessary to a proper understanding of one of the leading controversies in this case.

The rule of the company upon the subject of "order-notify" shipments was as follows:

"123½. In waybilling shipments consigned 'to order,' forwarding agents will in every instance show on waybills the name and address of party to be notified, and receiving agents must not deliver such shipments until surrender of original bill of lading properly endorsed."

It is insisted by defendants that there was a custom of the railroad company whereby its agents were authorized to disregard this rule, and that it had been disregarded for a considerable time, more than a year at least, at the South Nashville freight office. Mr. McCampbell testifies that such was the custom, and he undertakes

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to fortify his statement by reference to the bill of lading books above mentioned, and a comparison of the dates there shown for the delivery of the bills of lading that had been issued on "order-notify" shipments, and the dates of delivery of cars shown by the switching lists, and the date of the return of the cars to the railroad company by the car service record. He testifies that by this comparison in hundreds of instances the cars were delivered to the consignees under such shipments from one to five or ten days before the bills of lading were surrendered to the railroad company, and that in some instances the difference was as much as thirty-five and even forty days; that deliveries of this kind were made to the Liberty Mills, the Cumberland Mills, the Model Mills, to Neil & Schofner, to Mr. Brooks, to C. D. Smith & Co., and others. His reliance upon the bills of lading books is based on the fact that these books contained the true date on which the bills of lading were surrendered to the railroad company. It appears, however, upon an investigation of these books, that the entries were not made daily; that often there was an interval of five and sometimes ten days between entries; and that several of these little books were being cared for at the same time—at least two or three of them at one time. He admits that these intervals occurred, and says that it was not the custom to make the entries daily, but only when he could get time from other duties to do this, but that in the meantime he endeavored to keep the bills of lading in regular sequence as they were delivered, and to keep them in the same sequence when he came to write

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the car numbers down into the bills of lading books; and it is a fair deduction from his testimony that in the meantime the entries were really kept in this sequence. Mr. Whitworth, who was night clerk at the time that Mr. McCampbell was chief clerk, says that the effort was to enter them in the order in which they came in, but that he does not know whether the entries were so made or not; nor in fact does Mr. McCampbell know whether he succeeded in getting them in the proper sequence, as an examination of his whole testimony would indicate, especially his cross-examination.

A singular thing, however, about this proof of custom is that no one seems to have had knowledge of it except Mr. McCampbell and C. D. Smith & Co., to whom he let the goods go, which was the origin of the present litigation. The various millers and dealers to whom he testifies that he delivered goods prior to the surrender of the bills of lading say that they never asked such indulgence and never received it; that Dr. Bumpas, the agent at the South Nashville office, was very strict upon this subject, always insisting upon the bills of lading, and was really brusque and offensive about the matter; that Mr. McCampbell, while more pleasant, was equally positive in his enforcement of the rule, so far as they were concerned. In response to, or in explanation of, this evidence, Mr. McCampbell testifies, and it is so argued in the brief of his able counsel; that in allowing goods to be so delivered he had no thought of giving credit to any of the customers to whom deliveries were thus made, and it is said in the argument that in all

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probability these millers and dealers believed that they were complying with the requirements of the company; that the cars were placed on their several side tracks, or delivered at the points to which they had directed delivery to be made, very often before 9 o'clock in the morning, and that the cars had been unloaded and had been returned to the railroad company before the bank opened, and before these customers could pay the draft with the bill of lading attached and return it to the company; and that while the leading men of these concerns, who were examined by the railroad company, truly state that they knew nothing of any such facts, still their subordinates, who did the actual unloading, knew these facts, and if they had been examined they would have shown such facts. However, the defendants did not examine such subordinate employees as the customers referred to. So the fact remains that these customers all deny that any such deliveries were made to them, but say that before deliveries of the cars to them were made they procured from the banks, and filed with the railroad company, the bills of lading covering the cars.

Another peculiar feature of the matter is that, although Mr. McCampbell discovered, at least as far back as the early fall of 1898, that he had delivered to C. D. Smith & Co., without surrender of the bills of lading, some twenty-eight cars of wheat, of the value of \$28,000, for which sum he had thereby rendered the railroad company liable to the shippers, he did not communicate this fact to the agent, Dr. Bumpas, or to any one of the officials of the railroad company. It is claim-

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ed, and he says, he had been quite busy, and had not checked up his bills of lading, and when he did so, and discovered that C. D. Smith & Co. were twenty-eight cars ahead of him, it struck him like a thunderbolt; that he immediately telephoned to C. D. Smith & Co., calling off to them the numbers of the cars which had been so delivered to them, and demanding bills of lading; that C. D. Smith & Co. replied that he was correct in his statement, but that they were now unable at once to bring up the bills, and asked for a conference with him on the platform. Mr. McCampbell invited Mr. Smith to his office. Mr. Smith insisted upon a conference on the platform. Mr. McCampbell finally acceded to this, and accordingly they met on the platform. Mr. McCampbell says that Mr. Smith said to him that, if he (McCampbell) would continue to deliver cars to C. D. Smith & Co. as he had been doing without demanding the bills of lading, the firm would be able to take up the liability. Mr. McCampbell says that he did not make any promise to Mr. Smith, but decided in his own mind that he would follow this plan. He was asked whether he informed Dr. Bumpas of what had occurred, and he said, "No." Asked why he did not, he replied that he knew, if he informed Dr. Bumpas, the latter would immediately inform the chief agent, Mr. Saunders, who would inform the railroad authorities at Louisville, and the railroad company would immediately close down on C. D. Smith & Co. and force them into bankruptcy, and probably would lose the whole \$28,000. Influenced by these views, he decided that he

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would keep the matter to himself and endeavor to work out the liability in the method suggested by Mr. Smith. Matters went along under this arrangement between these two men until about the 11th of March, 1899. In the meantime C. D. Smith & Co. had reduced the liability to about \$12,500. At this juncture an inquiry came from a shipper at Louisville, asking whether a certain car had been delivered to C. D. Smith & Co. This was referred by Dr. Bumpas to Mr. McCampbell, and the latter replied that the car had been delivered. An inquiry then came as to whether the bill of lading was surrendered before the car was delivered. This was also referred to Mr. McCampbell, and he replied that it had not been. Two similar inquiries came from St. Louis, with the same result. Thereupon the whole matter was opened to Dr. Bumpas by Mr. McCampbell. He immediately informed his superiors in office, and in this manner the offices at Louisville were notified. The railroad company at once took steps to recover such of the wheat as they could, and did succeed in recovering parts of two car loads, which, on being sold, realized about \$1,026. This was credited on the liability, and left a balance of about \$11,500, on which the present suit was brought. The railroad company immediately notified the Guaranty Company of the loss, and demanded reimbursement. The shippers have demanded the value of the cargoes from the railroad company. The Guaranty Company did not at once flatly refuse to pay, but desired negotiation, either with a view to settlement, or for the purpose of convincing the rail-

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road company, without suit, that it was not liable. The railroad company referred the matter to its attorneys at Nashville, and the Guaranty Company made similar reference to its attorneys. Before these attorneys had conferred, however, Mr. McCampbell had gone before the attorneys of the railroad company at their request, and had made a statement about the matter. He admitted that he had delivered the cars without surrender of the bills of lading; that he knew at the time that he was making the railroad company liable for the value of the cars; and said that he did not know at the time whether C. D. Smith & Co. were solvent or not. But, singular to relate, he made no claim or defense that in so delivering the goods he had acted in accordance with any custom of the company, but excused himself on the ground that he was very busy, and that the deliveries so made were inadvertent. There is another singular fact that in the conference between the attorneys for both sides, wherein the attorneys for the Guaranty Company were endeavoring to convince the attorneys for the railroad company that it was not liable, no claim was made by them that Mr. McCampbell had acted in accordance with any custom of the road to violate its own rule upon the subject.

It is true that, some weeks after Mr. McCampbell had made his statement to the attorneys of the railroad company, he replied, to an article in the "American" charging him with shortage, that he had acted only in accordance with a custom of the business, and that therefore

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he had done nothing wrong. It seems to us, however, that if there had been any such custom, it would have been the first defense that Mr. McCampbell would have made when he was called upon by the railroad company for an explanation; also that he would not have failed to impress this fact upon the attorneys of the Guaranty Company, who evidently had also had an interview with him, and it is not to be doubted that, if these attorneys had been put in possession of this information, they would have made, in the negotiations referred to, a stronger effort to convince the railroad company's attorneys that no liability existed because of such fact. This seems to indicate that the defense of a custom to violate the rule was a matter of second thought. Mr. McCampbell testified in his original examination that this was the custom at the South Nashville office and at other offices of this company; but on being requested, on cross-examination, to name another office, he was unable to do so.

In addition to the foregoing considerations, the improbability of the railroad company's authorizing, sanctioning, or tolerating a violation of the rule referred to is inherent. The rule which required that the goods should not be delivered without surrender of the bill of lading was very pointed, and incapable of misconception. It was, moreover, strictly in line with the duty of the railroad company to its customers, since a shipment to the order of the consignor, with directions to notify the consignee, is an unmistakable indication by the shipper to the carrier that the title to the goods will not

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pass and the duty to deliver will not arise until the draft has been paid, the bill of lading taken up, and the latter presented to the railroad company. *Bank v. Cummings*, 89 Tenn., 609, 18 S. W., 115, 24 Am. St. Rep., 618; *Charles v. Carter*, 96 Tenn., 607, 615, 36 S. W., 396; *North Pennsylvania R. R. Co. v. Commercial National Bank*, 123 U. S., 727, 8 Sup. Ct., 266, 31 L. Ed., 287; *Boatman's Savings Bank v. Western & A. R. R. Co.*, 81 Ga. 221, 7 S. E., 125; *Union Stockyards Co. v. Westcott*, 47 Neb., 300, 66 N. W., 419; *Weyland v. Atchison, etc., R. R. Co.*, 75 Iowa, 573, 39 N. W., 899, 1 L. R. A., 650, 9 Am. St. Rep., 504, and note pages 512, and 513; *Arkansas Southern Railway Co. v. German National Bank*, 77 Ark., 482, 92 S. W., 522, 113 Am. St. Rep., 160; *General Electric Co. v. Southern Railway Co.*, 72 S. C., 255, 51 S. E., 695, 110 Am. St. Rep., 600; *Lyons v. New York Central & H. R. Co.*, 119 N. Y. Supp., 703; *Id.*, 136 App. Div., 903, 120 N. Y. Supp., 1133. The railroad company, of course, in delivering goods so shipped, would be guilty of a conversion. *Seaboard Air Line R. R. Co. v. Phillips*, 108 Md., 285, 70 Atl., 232. And failure of the consignor to recover the goods from the party to whom they had been thus wrongfully delivered would not relieve the carrier of his liability for the conversion. *Midland Valley R. R. Co. v. J. A. Fay & Eagan Co.*, 89 Ark., 342, 116 S. W., 1171. It is difficult to conceive how any railroad company would place it in the power of a subordinate to thus cause it to violate its duty daily. The improbability becomes greater when it is remembered that shipments of the kind under ex-

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amination here amounted, along the line of the whole railroad, to an average of \$1,000,000 a day, and in the particular office concerned in the present litigation, the South Nashville office of the complainant, weekly, the liability was on an average of from about \$350,000 to \$500,000. We cannot believe that any business concern would knowingly sanction the exercise of so enormous and destructive a power by a clerk of one of its subordinate agents. Before the court could reach the conclusion that any competent business concern had been guilty of such folly, the evidence would have to be very clear and convincing. But, as we have already stated, no one seems to have known of this custom except Mr. McCampbell and C. D. Smith & Co. Dr. Bumpas, the agent, says that he knew nothing of it. Mr. Whitworth, the night clerk, says that he knew nothing of it, and it does not appear that any other railroad official knew of it.

But let it be assumed that there was such a custom in that office; it would by no means follow that the railroad company had thereby waived its rule. It would have to be shown, in addition to the adoption of such custom by the subordinate officer mentioned, that knowledge of this had been brought home to the railroad company, or that there were such facts in existence in connection therewith as would impute knowledge to the company. However, before it can be properly held that a railroad company has sanctioned a custom to violate one of its rules, it must appear that the habit of violation among the servants of the company was so constant, open, and

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general that no reasonable conclusion could be reached other than that the responsible officers of the company must have known it. This is the substance of the rule as laid down in numerous authorities of the highest respectability. 4 Thompson on Negligence, sec. 4163; 5 Thompson on Negligence, sec. 5404; 3 Elliott on Railroads, sec. 1282; 1 Labatt on Master & Servant, sec. 233. And see sections 198 and 200; 26 Cyc., p. 1161.

It is next insisted in behalf of the defendants that they are exonerated under the following clause of the bond:

“The company shall not be liable hereunder for any loss occasioned by mistake, accident, or error of judgment on the part of any employee; or by robbery, unless by or with the connivance or culpable negligence of the employee; and culpable negligence as used in this bond shall be deemed and held to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs of the same character.”

It is insisted that Mr. McCampbell was very busy at the time he permitted C. D. Smith & Co. to obtain the twenty-eight cars without surrender of the bills of lading, and he was thereby caused to overlook the fact. It is to be observed that this defense is in direct contravention of that previously urged that Mr. McCampbell was justified in making the delivery under a custom of the company to violate its rule; but, passing this, the record fails to show that Mr. McCampbell was so engaged as that he could not attend to this particular duty. He went to his office at 7 o'clock in the morning,

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and left at 6 in the afternoon, and sometimes returned after supper and worked until 10 o'clock. He had time to get his usual three meals a day, and at noon walked at least four squares to get that meal. The evidence also shows that the business was not more than one man could comfortably attend to. But, in addition to these facts, Mr. McCampbell had a record of all of the cars which had been shipped under "order-notify" consignments, and it was only a matter of a minute or two for him to look to this record and discover whether a car was under a shipment of the kind last referred to, or under what is called a "straight shipment." It might require several minutes to direct the delivery, but it would require only a moment to refuse it. He would not be justified, under the clause of the bond quoted, in saying that he forgot the rule. It is the duty of employees to keep the rules in mind and act in accordance therewith. Forgetfulness itself is negligence, since proper care will so impress a duty upon the mind as that it will not be forgotten; and the duty to so impress a rule is all the greater when the result of a violation of it will be serious loss to the business of the employer.

To deliver the cars under the circumstances was culpable negligence, within the sense of the paragraph quoted from the bond. Men of ordinary prudence and intelligence, when sending goods to a purchaser at a distant point under a contract that the goods shall not be delivered until the price shall be paid, do not usually permit delivery to take place until the money is received. It would be nothing short of folly to permit such de-

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livery, since the safety of the property may in any instance be imperiled. By this form of shipment the seller protects himself against the possible fraud or insolvency of the purchaser. By delivering the goods in disregard of the terms of the shipment, the shipper is subjected to all the dangers against which he sought to guard himself.

It therefore appears that Mr. McCampbell did not measure up to the rule of diligence and care which the parties agreed to in the bond.

It is insisted by the defendant the Guaranty Company that it is not liable because of a violation of the following provisions contained in the bond:

“If at any time after the beginning of the term for which this bond is written the employer suspect, or there come to the notice or knowledge of the employer, any act, fact, or information tending to indicate that any employee is or may be negligent, unreliable, deceitful, dishonest, or unworthy of confidence, the employer shall immediately so notify the company in writing at its principal offices in the city of Baltimore, and if the employer fail or neglect so to do, the company shall not be liable for any act of omission of such employee occurring thereafter.

“And if at any time after the beginning of the term for which this bond is written there come to the notice or knowledge of the employer the fact that any employee is negligent, unreliable, deceitful, dishonest, or unworthy of confidence, the employer shall immediately notify the company in writing of such fact, at its principal offices

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in the city of Baltimore, and failure to give such immediate notice shall relieve the company from all liability on account of such employee."

It is insisted that this part of the bond was violated under the following facts: The railway company was accustomed, from time to time, to send inspectors along its line to investigate its various offices. It was required of these inspectors that they should appear in the offices referred to without previous warning and immediately call for the cash and count it, and also take charge of the office, and make all such examinations and inquiries there as would enable them to answer sixty-nine inquiries which the company propounded to the inspectors themselves. It appears that three such inspections were made along about the time of the occurrence of the breaches of duty which are the subject of the present controversy. Several inquiries were made, running from numbers 39 to 45, inclusive, to elicit information whether the agents ever delivered freight without payment of "charges." The inspectors replied in the affirmative. The inspectors were directed, in case their answers should be in the affirmative on this subject, to refer to form 788. It should be stated in this connection that the railway company permitted freight to be delivered to certain customers without previous payment of charges, where permission had been given by the general freight office to that effect, and such permission was based upon the known reliability or solvency of the particular customers. Now, the question is whether the word "charges" here meant simply freight charges, per-

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taining to the revenue of the road, or likewise the money due for the value of cargoes shipped "order-notify," the price of which was represented by drafts attached to bills of lading sent by the shipper to a bank or banks for collection by such bank or banks from the consignee. It is insisted by counsel for the defendant that it did cover such shipments. An examination of the numbered inquiries to which the inspectors were required to respond on this subject convinces us that reference was had only to freight charges or the revenue of the company. The inspectors themselves say they had always considered it to have this meaning alone, and never at any time had any idea that it had any bearing upon "order-notify" shipments, so far as concerned the value of the cargo, and that when they made these reports they understood it themselves as referring only to freight charges, and that they had made no examination as to whether the drafts in bank had been paid and the bills of lading surrendered before delivery of the cars. This meaning is obviously the true one, because the agents had nothing to do with the collection of the drafts in bank. This was the business of the banks, and, indeed, the consignee could not have lawfully paid these drafts to the railroad company. The opposite view is based upon an opinion given on cross-examination of the witness C. Quarrier, who was cross-examined by counsel for defendant upon the meaning of rule 257. This rule is:

"Freight must not be delivered until the freight delivery book is receipted and all charges are paid.

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Agents must not give credit to any one without special permission of the general freight agent."

Mr. Quarrier was cross-examined specially upon the meaning of the word "until the freight delivery book is receipted and all charges are paid." He said that the word "charges" here meant freight charges. Counsel for defendant asked him if he did not think it also meant the value of cargoes shipped under "order-notify" bills of lading. He replied that he thought that such bills would also be charges against the car, and that they should not be delivered without payment of the drafts. Counsel for defendant adroitly used this opinion of Mr. Quarrier in endeavoring to solve the meaning of the inquiries which the inspectors above mentioned were required to respond to. Mr. Quarrier did not have these inquiries in mind at all at the time he was examined, nor was his attention at that time drawn to them. When his attention was drawn to that particular subject in another part of the examination, he said, in substance, that the railroad company had never caused inquiries to be made upon that subject at all, because it had not deemed it necessary, on grounds which will be presently stated. As we have said, the inquiries responded to by the inspectors could not have meant any such thing, and we may add, also, that rule 257, which is really immaterial in this connection, had no bearing upon shipments "order-notify," which subject was controlled by rule 123½ already copied into this opinion. In addition, as further showing that the inspectors were not understood as responding to the subject of shipments "order-

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notify" in making answers to the inquiries concerning "charges," it appears from these inquiries that under inquiry number sixty-seven the inspectors were required to report whether the agents understood that they were not to deliver "order-notify" shipments without surrender of the bills of lading. The inspectors responded to this inquiry that the agent understood the matter.

It is next insisted that, if the railroad company did not violate the paragraphs above quoted, it violated the following:

"That it" (the railway company) "will at all times during the term hereof take and use all reasonable steps and precautions to detect any act or omission upon the part of any employee which would tend to render the company liable for any loss; and when any employee for whom the company is surety hereunder is acting in the position of joint agent for the employer and any other person, company, or corporation, joint audits of his books and accounts shall be made by the employer and such other person, company, or corporation."

It is insisted that if the report of the inspectors upon the subject of "charges" did not embrace the drafts due upon the "order-notify" shipments, and they were not required to make investigation as to the delivery of this class of shipments prior to the delivery of the bills of lading, then no inquiry was made at all upon this subject, and the railway company violated its duty to the Guaranty Company in not using the precaution required in the paragraph just quoted.

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It is proven by the railroad company that to make the regular and continuously repeated investigations suggested an army of clerks would be required, and the outlay would be far greater than the risk; that an experience of more than forty years had justified the conclusion that the risk of such deliveries being made was very small, since only three such instances had occurred in more than forty years; and, furthermore, that there was no pecuniary or other gainful inducement operating upon the mind of any of the company's agents to cause them to make such deliveries. It further appears from the evidence that the inspections made by the railway company in the present instance were such as were accustomed to be made by other first-class railroad systems, including the Southern, the Illinois Central, and several other railway organizations mentioned in the evidence. It is proven that conferences upon this subject had been had between several first-class railroad systems, and it had been settled among them that so small a risk would not justify so great an outlay as would be required to thoroughly prosecute such an inquiry. We are of the opinion that these reasons are sufficient. Certainly where in more than forty years only three such derelictions had occurred out of transactions involving property worth millions of dollars yearly—say in forty years, making a low estimate, \$40,000,000—we say that when within that time, and in the handling of property worth so many million dollars, only \$3,000 worth had gone astray, a railway company could not be held guilty of negligence in

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failing to employ an army of clerks to run down or prevent a risk so small. But it is said by defendant company that since the present loss had occurred the railway company had taken warning thereby, and had imposed upon its inspectors the duty of examining and reporting upon this phase of the business, and that one of the inspectors had testified in this case that there was little difficulty on their occasional visits in accomplishing this work, aside from its tediousness; hence it is argued that no great number of clerks was required for this duty, unless it should be made a matter for continuous daily examination at the railway companies' headquarters. Let this be granted; still the substance of the reason assigned remains, *viz.*, that the risk had been found so small during a preceding period of forty years' experience by the complainant company, and in the experience of other well-managed railway companies, and the inducement to a breach of duty in this regard was so remote, that one could not reasonably anticipate danger of loss from that source from the negligence or dishonesty of employees, and it could not be supposed the parties to the contract had such a contingency in mind at the time they adopted into their contract the clause quoted.

The foregoing presents the substance of all the material controversies offered for our consideration. There is no merit in any of them, as we see the case, and the judgment of the chancellor is affirmed.

Before closing this opinion we deem it proper to say that we believe Mr. McCampbell is an honest man, and

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that his conduct, which is the subject of the present inquiry, was the result only of negligence, induced, perhaps, by an overzeal on his part to hurry the unloading of cars, and the return of cars into the regular channels of commerce; that is, to prevent them from being held loaded too long. Since Mr. McCampbell was discharged by the complainant from its service, he has occupied several important positions with responsible concerns, and no doubt has received and merited their confidence. The errors committed by him while in service of the complainant have probably served as a warning against similar acts.

It is also proper to be noted that while this case has been in litigation since 1899, it reached this court only within this term, and has been disposed of with that promptness which this court has now for many years endeavored to use in disposing of its business, hearing its whole docket at every term. The delay in the lower court was caused by the immense field of inquiry which was explored by the respective counsel in their efforts to produce evidence to sustain their respective contentions. The record consists of five large volumes, and, in addition, exhibits containing thousands of pages. The briefs are very voluminous, covering more than 600 pages. We wish to express to the respective counsel engaged in this controversy our appreciation of the care and skill with which they have prepared and supported their respective contentions. The briefs are models of candor and force. They leave nothing to be desired in

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the way of a thorough presentation of all matters which the court was called upon to examine and consider.

ON PETITION TO REHEAR.

The bond executed by the defendant provides that for the period covered by it, and subject to its conditions and provisions, the company "will make good and reimburse to the employer any and all pecuniary loss of money, securities, or other personal property belonging to the employer, or in its possession as a common carrier, bailee, or warehouseman, sustained by the employer, by or through the personal dishonesty or culpable negligence of any employee, for whom the company is or shall have become surety hereunder, in connection with the duties pertaining to the position to which he has been or may be appointed by the employer, and for which the employee shall be legally liable to the employer. . . . Provided, however, the company's liability on account of any employee shall in no case exceed the amount for which the company shall have become surety hereunder for such employee, which amount is set opposite his name in the schedule." The bond provided that the liability of the Guaranty Company was subject to the conditions and provisions therein contained, and that these should be conditions precedent to the right of the employer to recover. Among these conditions and provisions were those set out in the original opinion.

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The amount set opposite the name of T. C. McCampbell was \$10,000. This was the full amount of the bond, in so far as it affected the liability of the Guaranty Company for the good conduct of McCampbell. The chancellor rendered a decree for this sum and for interest thereon. The matter of interest is the complaint made in the petition to rehear filed by the Guaranty Company. It is insisted that the penalty of the bond, \$10,000 is the full amount of the liability of the Guaranty Company, and that such bonds do not bear interest, although it is conceded that, after judgment is rendered thereon, the judgment will bear interest.

On appeal to this court the decree of the chancellor was affirmed, as appears from the original opinion. No point was made upon this subject, either in the oral or printed argument, and it is insisted by counsel for complainant that this was not included in the assignment of errors, and therefore cannot be considered by the court. This is a mistake. The assignment of errors reads: "The court erred in adjudging the defendant Guaranty Company liable for \$10,000 and interests and costs for any amount." The point, therefore, was made in the assignment of errors, although, as stated, it was not pressed in the argument. Under this assignment the court could have acted on the matter of interest, but did not do so because nothing further was said about it in the briefs, and the court supposed that the defendant did not wish to press the point, and therefore it was not considered. We cannot say, however, that the point was waived, inasmuch as it was made in the assignment of

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errors in the manner just stated, and therefore it is competent for the defendant to bring it to the special attention of the court in the form of a petition to rehear.

We are of the opinion that the relief asked in the petition must be granted, and interest prior to the date of the judgment below must be stricken out. The nature of the judgment in this class of cases is governed by Shannon's Code, sec. 4704, which reads as follows:

"In actions brought on bonds or agreements for the payment of money, or with collateral conditions, and recovery had by the plaintiff, the judgment shall be entered for the stipulated penalty to be discharged by the payment of the principal, and the interest due thereon, or the damages assessed by the jury, and execution shall issue accordingly."

The bond in question is a bond with collateral conditions, and expresses only a maximum amount of liability; the existence of liability at all depending upon the breach of duty by the employee whose conduct was insured, and the amount of the liability depending upon the extent to which that breach should go. It might be that only a few dollars would be lost by his misconduct, or the whole amount insured. The bond, therefore, was conditional in two aspects: First, as to the liability, dependent upon the compliance of the employer, with certain conditions precedent; and, secondly, upon the extent of the breach of duty upon the part of the employee. There was no certain amount contracted for, and

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only a maximum amount dependent upon the conditions aforesaid.

The question whether such interest can be allowed on the penalty has been before this court in several prior cases, in which it has been adjudged that interest could not be allowed. These cases are: *Cherry's Executors v. Mann*, Cooke, 268-273, 5 Am. Dec., 696; *Overall v. Babson*, 2 Yerg., 71-72; *State, etc., v. Blakemore*, 7 Heisk., 638; *Rhea v. McCorkle*, 11 Heisk., 415, 416; *Fidelity & Guaranty Co. v. Rainey*, 120 Tenn., 357, 377, 405, 406, 113 S. W., 397.

There is a case apparently sustaining the opposite view; that is, the case of *Bank v. Guaranty Co.*, 110 Tenn., 10, 75 S. W., 1076, 100 Am. St. Rep., 765. But what was there said upon the subject was merely an inadvertence occurring at the close of the opinion. The subject was not discussed in that case, nor was any error assigned upon the point. The same learned judge who delivered the opinion in that case likewise delivered the opinion last cited, in which, after his attention was drawn to the point, the opposite and correct view was taken. *Fidelity & Guaranty Co. v. Rainey*, supra.

It is true, as insisted by counsel for complainant, that bonds guaranteeing the fidelity of employees or agents, executed for a consideration by companies organized for and engaged in that business, are considered and treated by the courts as insurance contracts, when under construction, with a view to ascertaining the nature and extent of the liability assumed, and such companies are not in that respect entitled to the favorable

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consideration accorded to gratuitous sureties. Cooley's Briefs on the Law of Insurance, vol. 1, pp. 1-14, 87, 88, 236-243, 630-638, 782, 783. But nevertheless they are in form bonds with collateral conditions, limited by a sum expressed therein, called the "penalty," and when judgments come to be rendered on them they are governed by the section of the Code above referred to, and the amount of the penalty cannot be exceeded.

The other branch of the petition, questioning the grounds on which the court held the Guaranty Company liable, must be overruled. We sufficiently stated our views upon this subject when the original opinion of the court was delivered on a former day, and nothing new is urged in the petition. A petition for rehearing should never be used merely for the purpose of rearguing the case on points already considered and determined, unless some new and decisive authority has been discovered, which was overlooked by the court. The office of a petition to rehear is to call the attention of the court to matters overlooked, not to those things which the counsel supposes were improperly decided after full consideration. "During a pretty long period of judicial life," said Mr. Justice Story, in *Jenkins v. Eldredge*, 3 Story, 299, Fed. Cas., No. 7267, "it has been my misfortune on many occasions to have differed widely from counsel on one side or the other, in important causes, as to the merits thereof. But this, although a matter of regret, could not, as it ought not, in any, the slightest degree, influence the duties or judgment of the court. The as-

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severations of counsel, however solemn, have nothing to do with the facts or merits of causes before the court; and if any judge could be so unstable in his views, or so feeble in his judgment, as to yield to them, he would not only surrender his independence, but betray his duty. However humble may be his own talents, he is compelled to treat every opinion of counsel, however exalted, which is not founded in the law and the facts of the case, to be voiceless and valueless. . . . They" (rehearings) "have been exceedingly rare in this court, I admit, as, in my judgment, they ought to be, unless some plain, obvious, and palpable error, or omission, or mistake, in something material to the decree, is brought to the notice of the court, which had before escaped its attention. But if a rehearing were to be granted upon the mere certificate of counsel, who had argued the cause, that, in their judgment, the decree was erroneous (a certificate which, with great sincerity and readiness, would almost always be given by the counsel), it is obvious that in the great mass of equity causes of a difficult and important nature, in this court, depending upon conflicting views of law, and also upon conflicting and often irreconcilable evidence, a rehearing would be almost a matter of course; and, considering the vast time occupied hearing such causes, there would be little time left for the court to devote itself to any other business, and the other suitors in the court would suffer the most oppressive delays, and often the most irremediable injustice. . . . If rehearings are to be had until the

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counsel on both sides are satisfied, I fear that suits would become immortal, and the decision be postponed indefinitely." 3 Story, 299, Fed. Cas., No. 7267.

The judgment will be modified, as to the Guaranty Company, so as to conform to the present opinion.

McEwen v. Coal & Land Co.

JOHN J. McEWEN v. THOMAS COAL & LAND
COMPANY *et al.*

(*Nashville.* December Term, 1911.)

1. **LAND LAWS.** Checkerboard system of entries is valid; each entry joins another in the system, and specialty of each depends upon specialty of initial entry, when.

The checkerboard system of entries is valid; and if the system is properly located, so that the various entries join each other by proper description, the entry remotest from the initial entry of the system, by tracing back through the intermediate entries, incorporates upon its face, as a matter of law, the locative calls contained in the initial entry, and each entry of the system is special where the initial entry is special. (*Post*, p. 702.)

Cases cited and approved: *Bleidorn v. Pilot Mountain C. & M. Co.*, 89 Tenn., 186; *Coal Co. v. Scott*, 121 Tenn., 88.

2. **SAME.** Same. Initial entry must be special to render the others special when containing no locative call except to adjoin others of the system.

In a checkerboard system of entries, where each of the final and intermediate entries contains no locative call, except a call to adjoin others of the system, the initial entry must be special, in order to render the subsequent entries special. (*Post*, pp. 702, 703.)

3. **SAME.** Special entry is defined.

An entry of public state lands, to be special, must contain a reference to some thing or natural mark from which, either singly or together, the land can be ascertained with reasonable industry to those acquainted in its neighborhood. (*Post*, p. 703.)

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4. **SAME.** Special entry must be such upon its face, and cannot be made such by extrinsic proof.

A special entry must be special in its description; and, if it is defective in this respect, it cannot be aided by extrinsic proof. (*Post*, p. 703.)

Cases cited and approved: *Barnet v. Russel*, 2 Tenn., 20; *Barnes v. Sellars*, 2 Sneed, 33; *Berry v. Wagner*, 5 Lea, 564.

5. **SAME.** Call "meandering said bluff eastwardly, crossing Little Laurel," does not make the entry special.

The call in an entry "meandering said bluff eastwardly, crossing Little Laurel," is not such as to make the entry special; for it does not show that the line crosses Little Laurel where it pours over the bluff, and cannot refer to any particular point or spot of land; nor can it be gathered from such call alone that the creek in fact flows over the bluff. (*Post*, pp. 703-705.)

6. **SAME.** Any presumption that preceding entry called for is special will not be indulged in, where proof shows it not to be special.

Where an entry calls for a certain corner of a preceding entry as its beginning point, any presumption that the preceding entry is a well-known tract of land, with the result of making the entry containing such call special, can no longer be indulged in, where it is shown in proof that all the entries were part of a checkerboard system, and that the initial entry was not special. (*Post*, pp. 705, 706.)

Case cited, distinguished, and approved: *Coal Co. v. Scott*, 121 Tenn., 88.

Cases cited: *Barnet v. Russel*, 2 Ov., 10; *Simms v. Dickson*, Cooke, 137; *Kendrick v. Dallum*, Cooke, 220; *Graham v. Dudley*, Cooke, 353; *Talbot v. McGavock*, 1 Yerg., 262; *Berry v. Wagner*, 5 Lea, 564.

7. **SAME.** Entry containing no locative call cannot be made special by survey.

An entry, containing no locative call that will make it special, cannot be made special by a survey. (*Post*, pp. 706-710.)

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Cases cited and approved: Reid v. Dodson, 1 Tenn., 408; Reid v. Buford, 1 Tenn., 415; Smith v. Buchannon, 2 Tenn., 305; White v. Crocket, 3 Hay., 183; Winchester v. Gleaves, 3 Hay., 213; Trousdale v. Campbell, 5 Hay., 101; Terrell v. Murray, 2 Yerg., 384; Trousdale v. Campbell, 3 Yerg., 160; Donegan v. Taylor, 6 Humph., 501.

Cases cited, distinguished, and approved: Davidson v. Shelton, 1 Overt., 74; Davidson v. Shelton, 2 Overt., 2; White v. Crocket, 3 Hay., 185; Talbot v. McGavock, 1 Yerg., 271; Brummett v. Scott, 4 Heisk., 325; Berry v. Wagner, 5 Lea, 564; Henegar v. Matthews, 88 Tenn., 133.

8. **SAME.** Elder grant cannot be defeated by younger grant, except where it was based upon an older special entry.

The State's older grant cannot be defeated by its younger grant of the same land, in whole or in part, upon extrinsic evidence, except by showing an older special entry upon which the younger grant was based. (*Post*, pp. 710-712.)

Acts cited and construed: Acts 1784, 1786, 1789, and 1806, ch. 1, secs. 7 and 10, for removal of land warrants.

Cases cited and approved: Sevier v. Hill, 2 Tenn., 23; Polk v. Hill, 2 Tenn., 163; Anderson v. Cannon, Cooke, 27; Donegan v. Taylor, 6 Humph., 501; Thomas v. Tankersley, 5 Cold., 165.

9. **SAME.** State's earlier grant based on later entry prevails over its later grant not based on an earlier special entry, though the latest enterer knew what land was intended to be located by the earlier entry.

The State's earlier grant on the later of the two entries will prevail over a later grant on the earlier entry of the same land, where the earlier entry was not special, though the second enterer was chargeable with personal knowledge of what land was intended to be covered and located by the earlier entry, by reason of the fact that the same person acted as agent for the respective enterers in locating both entries; for personal notice is not such as the law prescribes, and the secret and un-

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expressed intention of the locator, or enterer, cannot indicate to subsequent locators, or enterers, the land meant to be appropriated, so as to affect their conscience with unfairness, should they attempt to appropriate the same land which the other contemplated. (*Post*, pp. 712-718.)

Cases cited and approved: *Reid v. Dodson*, 1 Tenn., 408; *Reid v. Buford*, 1 Tenn., 418; *Winchester v. Gleaves*, 3 Hay., 218; *Craig v. Polk*, 3 Yerg., 249.

Case cited and overruled: *Coal Co. v. Scott*, 121 Tenn., 88.

FROM GRUNDY.

Appeal from the Chancery Court of Grundy County.—
T. M. McCONNELL, Chancellor.

CHAS. C. MOORE and L. V. WOODLEE, for complainant.

PEARSON & BENNETT and SMITH & CARSWELL, for defendants.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This is an action of ejectment, involving four separate tracts of land. The complainant has the oldest entry and the youngest grant. The defendants introduce the oldest grants, to which they claim title. The complainant claims title to grant No. 7890, based upon

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entry No. 4219, grant No. 7879, based upon entry No. 4265; grant No. 7892, based upon entry No. 4271, and grant No. 7891, based upon entry No. 4295, all issued by the State of Tennessee to Joseph H. McEwen. The complainant has established a proper deraignment of title to each of the foregoing grants. The grants relied upon by the defendants, and to which they have deraigned title, are Nos. 5987, 5993, 5986, 5090, 5099, and 5159, all issued to Samuel R. Barrel prior to the date of the grant under which complainant claims. The defendants have also introduced grants Nos. 5514, 5520, 6833, 6836, and 6837, issued to Francis A. Dickens, and grants Nos. 5237, 5311, and 5396, issued to Stephen Haight, for the purpose of showing the title outstanding against complainant. The entries upon which the complainant's grants are based are part of a checkerboard system of entries and grants. The initial entry of the system is as follows:

"No. 4042. Peter Yates enters 5,000 acres of land in Warren county, Tennessee, on Cumberland Mountain, on the headwaters of Collins river. Beginning on a black oak standing on the bluff of the right-hand fork of Collins river; thence meandering said bluff eastwardly, crossing Little Laurel; thence northwardly; thence westwardly; thence southwardly to the beginning, plotting out all prior claims.

"October 10, 1835.

"PETER YATES, Locator."

This entry was surveyed October 19, 1836, but no grant ever issued upon it. The survey was in neither an oblong

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nor a square to the cardinal points of the compass, but ran with the meanders of the "left bluff of the left-hand fork of Collins river" 120 poles, thence due east 180 poles, and thence northeast 434 poles to a hickory forming the southeast corner of the entry. Upon this last leg of the description, Little Laurel was crossed, but not at a point where it flows over the bluff of Collins river. Exhibit No. 1 to the deposition of M. E. Deakins is a map showing the location of the lands in controversy, and estimating upon this map, in connection with the original survey, the Little Laurel does not flow over the bluff of Collins river for about 400 poles south of the southern line of entry No. 4042 as originally surveyed.

The next entry in the checkerboard system necessary to be noticed is entry No. 4216 in the name of Elias Mayo as follows:

"Entry No. 4216. Elias Mayo enters 5,000 acres of land in Warren county on the waters of Collins river, to begin near the southwest corner of a 5,000-acre tract of land entered in the name of Peter Yates, bearing date 10th of October, 1835, and to run south and east, counting out all older claims until the quantity is made.

"May 16, 1836.

"JOHN STUMP, Locator."

This entry was never surveyed, but was re-entered under No. 4267 and surveyed September 6, 1836. The next entry on the checkerboard is entry No. 4217 and is as follows:

"Entry No. 4217. Jesse J. Everitt enters 5,000 acres of land in Warren county on the waters of Collins river,

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beginning at the west corner of an entry made in the office this day in the name of Elias Mayo and to run south and east, counting out all older claims.

"May 16, 1836.

"JOHN STUMP, Locator."

This entry was surveyed September 6, 1836. The next entry is No. 4219, as follows:

"Entry No. 4219. Samuel Edmonson enters 5,000 acres of land in Warren county on the waters of Collins river, to begin on the southeast corner of a tract of land this day entered in the name of Jesse J. Everitt of 5,000 acres of land, and to run east and south, counting out all older claims.

"May 16, 1836.

"JOHN STUMP, Locator."

The next entry is No. 4265, surveyed August 31, 1836, and is as follows:

"Entry No. 4265. Joseph McEwen enters 5,000 acres in Warren county, Tennessee, on the headwaters of Collins river, to begin at the southwest corner of a tract of land entered in this office in the name of Samuel Edmonson, and to run south and east, counting out older and legal claims until the quantity is made.

"August 20, 1836.

"JOSEPH McEWEN, Locator."

The next entry is No. 4271, surveyed September 6, 1836, and is as follows:

"Entry No. 4271. Church Lanier enters 5,000 acres of land in Warren county, Tennessee, on the headwaters of Collins river, beginning at the southwest corner of a

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5,000-acre survey in the name of Samuel Edmonson, to run west and south for complements, counting out all older claims until the quantity is made.

“September 5, 1836.

“JOSEPH MCEWEN, Locator.”

The next entry is No. 4269, surveyed September 6, 1836, and is as follows:

“Entry No. 4269. Greenwood Payne enters 5,000 acres of land in Warren county, Tennessee, on the waters of Collins river, beginning at a double white oak, the northwest corner of George Cagle’s 5,000-acre survey, running north and east, counting out all older claims until the quantity is made.

“JOSEPH MCEWEN, Locator.”

Entry No. 4268, surveyed September 6, 1836, is as follows:

“Entry No. 4268. George Cagle enters 5,000 acres of land in Warren county, Tennessee, on the waters of Collins river, beginning at a black gum, the southwest corner of Church Lanier 5,000-acre tract, and running west and north, excluding all prior claims.

“September 1, 1838.

“JOSEPH MCEWEN, Locator.”

The propositions relied upon by complainant’s counsel to establish the specialty of the older entries so as to enable the younger grants to overreach the older grants shown in evidence are: (1) That they form a part of a checkerboard system of entries running back to an initial special entry; (2) that each calls to begin upon a corner of a well-known tract of land; (3) that the four

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entries upon which the complainant's grants are based were located by the same person who located the entries upon which the Barrell grants are based, and that this locator, in making the entries for the Barrell grants, had knowledge of the location of the previous entries he had made for the McEwen grants, and, as he was the agent of Barrell in this matter, his knowledge would be imputed by the law to Barrell and all subsequent grantees in the Barrell chain of title, thereby making the McEwen entries special as to them.

1. What is commonly known as a checkerboard system of entries has been held valid by this court, so that the entry most remote from the initial entry of the system is said, by referring to the intermediate entries, to incorporate upon its face, as a matter of law, the locative call contained in the initial entry; and if the system is properly located, so that the various entries join each other as the entries direct under the law, each entry of the system is special. *Coal Company v. Scott*, 121 Tenn., 88, 114 S. W., 930; *Bleidorn v. Pilot Mountain C. & M. Company*, 89 Tenn., 186, 15 S. W., 737.

If the only locative call of the intermediate and final entries in the checkerboard is a reference to some other entry of the system, each must finally depend upon the initial entry for specialty. It is manifest that the validity of such a checkerboard system must depend upon the specialty of the initial entry. Entries in the checkerboard, other than the initial one, which contain no locative call, except a call to adjoin others of the system, are mere geometrical points and lines, and exist

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only in thought. In their very nature, their location will depend upon the location of the initial entry, and, if it is vague, and therefore void, all of the entries of the system depending upon it are likewise void.

It therefore becomes necessary to determine whether the initial entry of this system in the name of Peter Yates is a special one. An entry, to be special, must in some part of it contain a reference to some thing or natural mark from which, either singly or together, the land can be ascertained with reasonable industry by those acquainted in its neighborhood. It must be special in its description, and, if it is defective in this respect, it cannot be aided by extrinsic proof. *Barnet v. Russet*, 2 Tenn., 20; *Barnes v. Sellars*, 2 Sneed, 33; *Berry v. Wagner*, 5 Lea, 564.

The call in the entry under consideration which, it is claimed, points out the locality intended to be appropriated by it is "meandering said bluff eastwardly crossing Little Laurel." It is argued that this call shows that the entry should cross Little Laurel where it pours over the bluff of the right-hand fork of Collins river, and it would therefore include a particular point of the Little Laurel and thus locate the land. This conclusion, however, is predicated upon a false premise. The entry does not say that the survey should cross Little Laurel where it pours over the bluff of the west fork of Collins river. Little Laurel is a stream some six or seven miles long flowing through the Yates entry in a southerly direction, and pours over a bluff some 400 poles south of the southern boundary line of the entry according to the

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survey claimed by complainant. It is thus shown that the official surveyor did not understand the entry to have the meaning now ascribed to it. The survey of the other entries in the system, as shown by the map, Exhibit 1, supra, likewise shows that no one claiming an interest in this checkerboard system understood that the Yates entry was to cross Little Laurel upon its south line where it pours over the bluff. So, if this entry be treated as sufficiently special to admit of extrinsic evidence of the location of the objects called for, it is seen that the call for Little Laurel cannot refer to any particular point or spot of land. This call of the entry does not direct that Little Laurel be crossed where it flows over the bluff, nor, indeed, can it be gathered from it alone that the creek in fact flows over the bluff. We are therefore of opinion that the Yates entry is not special. From what has been said heretofore, it must follow that the subsequent entries of the system, having no call for location other than such as must finally depend upon the Yates entry for specialty, must fall with it.

2. (a) The second insistence of complainant is that each of the foregoing entries calls to begin upon a corner of a well-known tract of land, and for that reason they are special. It is first said that the court will presume that the preceding entry called for in each one of the system was a well-known tract of land at the date of the entry; and, second, if that is not sound, the Everitt entry was surveyed before the issuance of the older grants, and it became possessed of the necessary element of notoriety by virtue of the survey. Hence, it is said,

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the Edmonson entry is special, because it calls for the Everitt, and the other three entries in controversy, calling for the Edmonson and the Everitt, are also special. In support of this contention, we are cited to *Talbot v. McGavock*, 1 Yerg., 262; *Simms v. Dickson*, Cooke, 137, Fed. Cas., No. 12869; *Barnet v. Russel*, 2 Overt., 10; *Kendrick v. Dallum*, Cooke, 220; *Graham v. Dudley*, Cooke, 353, Fed. Cas. No. 5665; *Berry v. Wagner*, 5 Lea, 564; *Coal Co. v. Scott*, 121 Tenn., 88, 114 S. W., 930.

The well-known tract of land referred to in the Edmondson entry is the Everitt entry, which refers to the Elias Mayo, which in turn refers to the Peter Yates. All of these entries, except the Yates, were made on the same day, and each refers back to the objects called for in the Yates for location. Having determined that the Yates entry is void for vagueness, it conclusively follows that there is no means of locating either of the entries dependent upon it, and it is thus impossible for either entry to have called to begin upon a well-known tract of land upon the day of its date.

There is no basis for the indulgence of a presumption establishing the notoriety of the entries involved in this case. The entries themselves are in proof, and the objects relied upon to establish their specialty are shown in the evidence. When it is shown that the initial entry is not special, this proves as a matter of substantive evidence that no one of the series is, or could be, well known in the neighborhood by virtue only of the call to adjoin each other. The indefiniteness of all the entries

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in the checkerboard is affirmatively established, and, if it be conceded that, in the absence of proof, the law would presume the entry called for notorious in the neighborhood, this presumption is rebutted and overcome.

The same was true of the facts of *Coal Company v. Scott*, supra, in so far as a presumption of law was indulged in favor of the notoriety of the entry there discussed. That entry was one of a checkerboard system, the initial entry of which was special upon its face, and the entire checkerboard was properly surveyed upon the ground. The entries were introduced in evidence and are copied in the opinion of the court, and they establish as a matter of affirmative proof that the southeast corner of entry No. 775 was either well known, or could have been ascertained by reasonable industry upon the part of any one acquainted in the neighborhood. Therefore there was no occasion to indulge a presumption of law in favor of the notoriety of this corner, and what was said upon that point was obiter.

(b) The definition of a special entry given in all of our cases, the substance of which has been stated hereinbefore, excludes the idea that an entry can acquire specialty by virtue of a survey. One of the chief objects of the law in requiring an entry to be special is to enable the surveyor to properly survey it out. The other, and the only other, object of specialty in entries is to notify subsequent enterers of the locality appropriated by the first entry. It would be an anomaly to say that the entry must be sufficiently special to enable the surveyor to survey it out, and at the same time to say that, not-

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withstanding the entry is so vague that the surveyor cannot properly locate it, yet if he disregard his duty, and assume to lay it down upon a particular spot in violation of the law, his unauthorized and illegal act imparts validity to the entry which was otherwise void. The object or thing relied upon for specialty must be designated upon the face of the entry. If it were not so, the surveyor could not get his directions for surveying the entry from the entry. Subsequent enterers must be notified of the location of the first entry by the objects called for in it. The survey, standing alone, does not show that the entry calls for a well-known tract of land; nor can it impart notice, in law or in fact, of the location of the entry. If this were not true, there could be no such thing as a vague entry after survey, and titles would originate, not with the entry, or grant, in case the entry is not special, but with the survey.

In *Reid v. Dodson*, 1 Tenn., 408, Judge Overton uses this language:

“It is left for the court to collect the general view the legislature had in requiring an entry. Now, it seems to me that the intention of the legislature was to apprise the surveyor and others where the land lay, so as to enable the surveyor to survey and others to make entries. All the acts of the legislature respecting the appropriation of vacant lands contemplate the idea that, as the surveyor was directed to survey the oldest entry first, the governor would issue a grant upon the first survey before a younger one. . . . The idea of the law is that the surveyor shall survey all entries, without

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calling on the enterers to show their claims. . . . It thence results that the entry shall be special to enable the surveyor to know where to survey it; and, if others have or wish to make entries, it ought to have such reasonable specialty as would enable them to steer clear of it; and to call on the surveyor to run it out first, so as to be able to avoid it. If it has not these specialties, it is as no entry at all, and no subsequent enterer ought in equity to be affected by it."

In the same case Judge Humphreys, concurring with Judge Overton, speaking to the same point, said:

"Whether an entry be special or not must depend upon the entry itself, and cannot be made better or worse by parol proof of what the enterer intended. It is a matter of law, and not of evidence. The ground of all proof respecting the calls of an entry must be laid in the entry. The entry must show the place called for, and parol or other proof will be received to show that the place in its situation, name, etc., agrees with the calls of the entry; but, where an entry is vague and uncertain, proof cannot make it good."

The same doctrine was announced in *Reid v. Buford*, 1 Tenn., 415, and *Winchester v. Gleaves*, 3 Hayw., 213.

The first enterer acquires his equitable title by virtue of his entry. A vague entry is void, and is as if no entry had been made. A grant can relate only to an equitable title conferred upon the enterer by virtue of a special entry. The entry is as much a record as the grant, and, when special, is the first link in the paper title. But, as stated, a vague entry is void, and it is perfectly mani-

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fest that the mere act of the surveyor in making an unauthorized survey of a void entry cannot make a valid contract between the enterer and the State out of that which the law has declared of no effect.

There is nothing in *White v. Crocket*, 3 Hayw., 185; *Davidson v. Shelton*, 1 Overt., 74 (also reported in 2 Overt., 2); *Talbot v. McGarock*, 1 Yerg., 271; *Brummett v. Scott*, 4 Heisk., 325; *Berry v. Wagner*, 5 Lea, 564, and *Henegar v. Matthews*, 88 Tenn., 133, 14 S. W., 554, contrary to the view expressed in the cases last cited above and herein. All of them, which bear upon the subject, are in entire accord. *Winchester v. Gleaves* and *Henegar v. Matthews* belong to another class of authority, and do not support the proposition that the survey of a vague entry before the issuance of the first grant renders the state's first grant void. The surveys and plats referred to in those cases are not the surveys of the county surveyor relied upon by complainant in this case. *Henegar v. Matthews* involved land in the Hiwassee district which had been sectionized by the act of 1819, requiring that a base line be laid down connecting two designated points. This was a survey directed by public law, intended to serve the purposes of the public, and was properly held to be such a record and such a public act that a call in an entry connecting with this base line was sufficient to make the entry *prima facie* special. To the same effect is *Winchester v. Gleaves*. But that an elder survey of the elder entry establishes priority in favor of the younger grant has never been held. *White v. Crocket*, 3 Hayw., 183; *Trousdale v. Campbell*, 5

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Hayw., 101; *Terrell v. Murray*, 2 Yerg., 384; *Trousdale v. Campbell*, 3 Yerg., 160; *Donegan v. Taylor*, 6 Humph.. 501.

In many of the cases, the survey is referred to as a survey of the entry; but as a matter of law and of constant practice the survey was for the grant. It was never intended that the survey could affect the *status* of the entry in any degree. It need not be surveyed at all. *Smith v. Buchannon*, 2 Tenn., 305. But usually the description employed in the entry was general, calling for well-known objects, natural and artificial, so as to designate the locality intended to be appropriated without specific reference to its boundaries. And in such case, before the grant could issue, it was necessary that the general locality indicated by the entry should be specifically described, so as to definitely fix the boundaries of the grant. But the first grant cannot be defeated by extrinsic testimony, except by showing that the younger grant was based upon an older special entry. *Sevier v. Hill*, 2 Tenn., 23; *Polk v. Hill*, 2 Tenn., 163, note.

By the acts of 1784, 1786, and 1789, the legislature of North Carolina provided that the second enterer might have his warrant removed from the tract first entered and have it surveyed upon any vacant land he might be able to find and obtain a grant for the land surveyed. Nothing was said in these statutes about entering the land to which the warrant had been removed, and no provision was made for a second entry, except, perhaps, as related to military warrants. But by Acts 1806, ch. 1, secs. 7, 10, removed warrants were placed on the same

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footing as other warrants. *White v. Crocket*, 3 Hayw., 183. In actual practice under those statutes, it happened that second enterers would remove their warrants to the same tracts of land, and the question soon arose as to the relation between the grant and the first survey. It was determined in *Anderson v. Cannon*, Cooke, 27, in 1811, and the question decided there has been regarded as finally settled. The court said:

“Suppose two individuals to have removed warrants, and each in search of land out of which to have them satisfied. C. owns one warrant, and D. the other. C.’s is surveyed on the 1st day of June, 1794, D.’s on the 1st day of July following. D. obtains his grant the 1st day of October in the same year, and C. obtains his the 15th day of the same month. Both these surveys and grants are for the same piece of land. . A contest arises between them, and how have the courts determined? Uniformly in favor of D., the first grantee. Why? Because the survey is not made a matter of record, and the reasons which would favor a first entry do not extend in favor of the first survey. In the case of grants on removed warrants, the first grantee has been considered by the laws of North Carolina as having the title. Still I admit some judges have even doubted this. In the case of *Shelby and Shannon*, on a motion for a new trial, one judge of the late superior court went upon the ground of priority of survey in giving his opinion. Afterwards, upon the second trial, when former determinations upon that point were brought to view, he changed his opinion.” *Thomas v. Tankersly*, 5 Cold., 165.

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In *Donegan v. Taylor*, 6 Humph., 501, the direct question here involved was presented for determination, and Judge Reese, speaking for the court, said:

“The grant of neither party was founded directly on an entry, but in each case upon surveys made by virtue of removed warrants. The survey of the younger grant was first made, and it is urged that the grant and survey relate to each other and constitute one title only. If this be not so, the lessor of the plaintiff was entitled to succeed in the trial below, by operation of his elder grant. The only relation established in North Carolina and Tennessee between a grant and any initiatory act of appropriation, which has been held to overreach the elder grant and confer better title, is the relation between the younger grant and the elder legal entry. Such effect, from the beginning of our land system to the present moment, has never in any case been conceded by our courts to the elder survey. No such case can be found in all the volumes of Overton, Cooke, Haywood, and Peck, during which period our courts were filled with investigation of land titles in every part of the State, and during which our peculiar land system was matured and authoritatively settled. On the contrary, it has been expressly held that the relation contended for between the grant and survey, and the effect claimed for it, do not exist.”

3. It appears from the record that a large number of grants of 5,000 acres each were issued to Samuel B. Barrell after the date of the McEwen checkerboard system and that these grants were procured substantially

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in this way: Felix Grundy and John and F. H. Stump entered into a series of contracts by which the Stumps undertook to locate, enter, and procure grants of land for the consideration of one cent per acre, together with an interest in the proceeds of the lands when sold. Samuel B. Barrell, of Boston, was also interested, through Grundy, in the sale of the lands that the Stumps might locate, and to facilitate the sale it was agreed that the grants should issue in the name of Barrell. All of the lands claimed by the complainants in this case are covered by grants to Barrell which are older in date than the grants to McEwen, but, as heretofore stated, are based upon younger entries. The Everitt entry, No. 4217, was located by John Stump, and grant No. 5194, based thereon, issued to Samuel B. Barrell. Stump also located the Edmondson entry, which calls for the Everitt entry. All of the other entries involved in this litigation call for the Edmondson, either directly, or through each other, so that the location of the Everitt entry will not only locate the Edmondson, but the remaining three entries involved herein. It is said by complainant that the Edmondson entry, No. 4265, must be special in so far as defendants are concerned, because Stump was the agent of Barrell, and located the Everitt entry, and also as the agent of McEwen located the Edmondson entry. Therefore Barrell, and all those claiming under him, must have had notice of the location of the Edmondson entry, because of the knowledge of his agent, Stump, who located both it and the Everitt entry. In support of this contention counsel cite *Coal Co. v. Scott*, supra.

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In that case J. A. Layne located the Dibrell entry, 783, and also the Hatfield entry, No. 2315, and the court held that, Layne being the agent of Hatfield, his knowledge would be the knowledge of Hatfield, and that Hatfield could not complain, nor those claiming under him, that he had no knowledge of No. 783. So it is concluded that Stump, having located both the Everitt and Edmondson entries, as agent of Barrell, could not be heard to say that he did not know of the location of the Edmondson entry when he procured grants to issue including the lands appropriated by it.

The defendants reply to this that the Everitt entry was not properly surveyed, and that Stump could not be charged with knowledge that the surveyor would mislocate the Everitt entry, and therefore, when Barrell procured his grants to issue, he did so upon the assumption that the checkerboard system of McEwen would be surveyed in conformity to its calls. However, this does not meet the issue. The Everitt entry was not only located by Stump, the agent of Barrell, but the land embraced within it was granted to Barrell by grant No. 5194. All of the entries and grants claimed by the complainants depend for location upon the Everitt; and, if the case of *Coal Co. v. Scott*, supra, is to be adhered to, the defendants cannot dispute the existence and location of the entries of complainant dependent upon the Everitt entry, because Stump, the agent of Barrell, must have known of the attempted location of the Everitt entry before the issuance of grant No. 5194 thereon. The contract between Stump and Grundy required

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Stump, not only to make the locations and see that the entries were properly made, but also to procure the issuance of grants in the name of Barrell.

It cannot be said that the vesting of a legal title will be arrested because the one about to receive it may have personal knowledge of facts which do not appear in the written evidence of the title. Personal knowledge of a subsequent enterer of facts which do not appear in the face of the first entry cannot determine the specialty of such entry.

This is not a new question in this State. In *Reid v. Dodson*, supra, Dodson's entry was located by Gen. James Robertson as the agent of Mabane. Reid's entry was dated December 20, 1783, and was: "Capt. Jesse Reid, transferred to Guilford Dudley Reid, enters 3840 acres of land lying on Little Harpeth, beginning above Absalom Tatum's line and up said river on both sides." Dodson had the oldest grant founded upon the youngest entry. It was in proof that Gen. James Robertson, who located the youngest entry so as to interfere with Reid's entry, knew where Tatum's claim lay. This knowledge upon the part of Robertson, who acted as the agent of Mabane in making the location of the younger entry, was urged upon the court as sufficient to supply any lack of notoriety found in the calls of the first entry. Dickinson & Grundy presented the question for the plaintiff, and Beck, Campbell, Haywood & White represented the defendant. Speaking to this point, Judge Overton said:

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"But it is urged that, if the entry should be esteemed insufficient, the same end is obtained by the notice which the defendants' locator had. I entirely agree with the argument of defendants' counsel in this respect that the courts of law have gone far enough in permitting an entry to impeach a grant. I might say, too far; but the law is considered otherwise. The act has prescribed what this notice shall be, an entry, and we are not authorized to admit a substitute. In equity in some cases, and on caveats, it is done, but even then with great care. The last entry of the defendant supersedes the first; and it must therefore be thrown out of the case."

Judge Campbell said upon the same point:

"The entry should be special on the face of it, and did not seem to him that this entry was so; if the entry is not special, the oldest grant must prevail."

Judge Humphrey said:

"Proof of notice, except from the face of the entry, cannot be received, in a court of law. The entry, being a matter of record, can only be resorted to on the ground of notice."

The same point was raised in *Reid v. Buford*, 1 Tenn., 418, and the judges determined it the same way. A strong case upon this point is *Winchester v. Gleaves*, supra. Winchester's entry called to begin at James Robertson's southwest corner on the section line. Winchester's entry was placed on the general plan of the township, and shown upon the plat as beginning at Record's southwest corner in the section line. The general plan showed precisely the spot claimed by Win-

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chester which his entry covered; but, as stated, his entry called for James Robertson's southwest corner, whereas it was plotted on the map as beginning on Record's southwest corner, which was the correct location. Gleaves and his locator both knew of the mistake in Winchester's entry in calling for Robertson's corner, instead of Record's and they admitted in their testimony that it was because of this mistake that Gleaves made his entry upon the same place. It was urged upon the court that parol evidence of the knowledge of Gleaves of the survey of Winchester's entry as shown by the general plan should be admitted for the purpose of establishing actual knowledge upon his part of the correct location of Winchester's entry. The court said:

"Thirdly, as to extrinsic testimony to add to or alter an entry, this court is clearly of opinion that no such testimony ought to be received. The secret and unexpressed intention of the locator cannot indicate to subsequent locators the land meant to be appropriated, so as to affect their conscience with unfairness, should they attempt to appropriate the same lands which the other contemplated.

"Fourthly, personal notice is not such as the law prescribes. It has directed an entry for that purpose, which is the same thing, in effect, as to say, You shall give a notice in writing. It would introduce the danger to be apprehended from parol proof of notice, and defeat the main purpose of the legislature, if the latter were to be received as sufficient."

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To the same effect is *Craig v. Polk*, 3 Yerg., 249.

The land system of this State is very complicated and very artificial. It has been matured by decisions of this court construing the various legislative enactments upon which it is founded, and at this time we are not permitted to indulge in a course of reasoning of our own, independent of the rules established by the early cases. Few questions respecting titles are now *res integra*. The foundation of the structure has been laid, and its superstructure built up almost altogether by the cases to be found from 1 Tennessee Reports down to and including Yerger's Reports. This system, in its particular application, belongs almost exclusively to the past, and to unsettle it now, or in the least shake or disturb any doctrine affecting the titles to land, would produce unspeakable disaster. The holding in *Coal Co. v. Scott*, *supra*, contrary to the cases above cited, is not supported by the citation of any authority, and none has been found by us.

Other questions were disposed of orally. The decree of the chancellor is reversed as to all of the defendants except defendant Pearson, and is affirmed as to him. Complainant will pay three-fourths of the costs of the appeal, and defendant Pearson one-fourth. The case is remanded for further proceedings.

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3. Any number of new trials upon the ground that there was no evidence to support the verdicts. Sec. 4850 (S.); sec. 3835 (M. & V.) sec. 3122 (T. & S. and 1858).....123, 129, 130
4. Indictment for assault with intent to commit murder in the first degree will support verdict of guilty of an attempt to commit voluntary manslaughter. Sec. 7195 (S.); sec. 6061 (M. & V.); sec. 5222 (T. & S. and 1858) 131, 132, 133

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5. Wife's land acquired by the joint adverse possession of husband and wife descends to heirs, subject to husband's curtesy. Sec. 4456 (S.); sec. 3459 (M. & V.); sec. 2763 (T. & S. and 1858)159, 172
6. Purpose of registration, aside from adverse possession, is to give notice and to prevent appropriation by grantor's creditors. Sec. 3752 (S.); sec. 2890 (M. & V.); sec. 2075 (T. & S. and 1858) 159, 175
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8. Question as to jurisdiction of county court to pass the accounts of testamentary trustees is reserved. Secs. 3529, 3530, 5414, *et seq.*, 6031, 6070 (S.); secs. 2737, 2738, 4393, *et seq.*, 4982, 5004 (M. & V.); secs. 1979, 1980, 3648, *et seq.*, 4204, 4232 (T. & S. and 1858)182, 203, 204
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11. Commissioners of elections cannot go behind the returns and recount the ballots, but must preserve the ballots under seal for use in a contest. Secs. 1268, 1270-1277, 1279, 1280, 1283 (S.)235, 253- 257
12. Statute prescribing precautions for prevention of accidents on railroads is imperative and mandatory. Secs. 1574-1576 (S.); secs. 1298-1300 (M. & V.); secs. 1166-1168 (T. & S. and 1858)260, 264- 267
13. Same. Duty of railroads to safely carry passengers is paramount to all others, and is superior to observance of statutory precautions, when and when not. Secs. 1574-1576 (S.); secs. 1298-1300 (M. & V.); secs. 1166-1168 (T. & S. and 1858)260, 267- 269
14. Discretionary appeal does not lie from decree overruling plea in abatement to jurisdiction of chancery court. Sec. 4889 (S.); sec. 3874 (M. & V.); sec. 3157 (T. & S. and 1858) 288, 290, 291
15. Privy examination, completed in form and manner prescribed by statute, is necessary to valid conveyance of a married woman. Secs. 3753-3755 (S.); secs. 2891-2893 (M. & V.); secs. 2076-2078 (T. & S. and 1858)..309, 312, 313

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16. Actions, appeals, appeals in error, and writs of error may be prosecuted upon the pauper oath. Sec. 4928 (S.); sec. 3912 (M. & V.); sec. 3192 (T. & S. and 1858). 314, 316, 317, 320
17. Replevin bond must be given by plaintiff, and suit cannot be instituted upon pauper oath. Secs. 4928, 5131 (S.); secs. 3912, 4113 (M. & V.); secs. 3192, 3377 (T. & S. and 1858) 314, 317- 319
18. Defendant in replevin may appeal, upon pauper oath, from justice's adverse judgment; statutes construed. Secs. 4928, 5149-5153 (S.); secs. 3912, 4130-4134 (M. & V.); secs. 3192, 3394-3398 (T. & S. and 1858) 314, 319- 321
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24. Parol sale of land is only voidable at election of either party, and may be specifically enforced if statute is not pleaded. Sec. 3142 (S.); sec. 2423 (M. & V.); sec. 1758 (T. & S. and 1858) 390, 400- 402
25. The statute of frauds must be specially pleaded, to be available as a defense to an action to enforce a parol contract for the sale of land. Sec. 3142 (S.); sec. 2423 (M. & V.); sec. 1758 (T. & S. and 1858) 390, 401
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27. Administration on estate of a deceased nonresident cannot be granted here to sue for wrongful death caused in another State, by a corporation of that State. Secs. 3935-3937, 4025, 4026 (S.); secs. 3043-3045, 3130, 3131 (M. & V.); sec. 2203-2205, 2291, 2292 (T. & S. and 1858)..... 408, 413-416, 418, 419
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